Mr. Cohen: It leaves in all the rest.

[fol. 85] The Court: Now, the defendant files a motion to direct against all remaining counts in the declaration and the amended count, I believe that is the way it is termed.

Mr. Smith: That is right.

Mr. Cohen: The additional count.

The Court: Let us see what you did call it.

Mr. Cohen: Amendment to complaint.

The Court: You call it amendment to complaint.

Mr. Smith: Yes.

Mr. Cohen: Yes.

The Court: That is supposed to be designated as 'e'.

Mr. Smith: That is right.

The Court: To be inserted after subdivision 'd' of paragraph 4, on page 4, and before the beginning of paragraph, —all right, that stands.

Mr. Cohen: And the other two in the original stand. The last two.

Mr. Smith: The last two of the original and the amendment stands.

Mr. Cohen: Yes.

Mr. Smith: That leaves three charges of negligence in here.

The Court: Now, then, defendant, files written motion to direct a verdict as against all remaining counts."

(Discussion between the court and counsel.)

"The Court: The motion for directed verdict denied as [fol. 86] to the remaining counts in the complaint and amendment to the complaint. You will supply in the record here now the amount advanced to this plaintiff.

STIPULATION

Mr. Smith: That is right. It is agreed that the defendant advanced to the plaintiff after his injury the sum of $1375 at different times over a period of a year and a half, approximating a year and a half.

The Court: Subsequent to the injury.

Mr. Cohen: On the agreement—subsequent to the accident, on the agreement that this was an advance payment on account of any recovery had by the plaintiff on this accident, and that he was to repay that out of whatever recovery he made.

The Court: All right.
Mr. Smith: If any."

(The following proceedings were had in the presence and hearing of the jury:)

JOHN G. FERSTEL, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is John G. Ferstel. I reside at Durand, Michigan. I am a conductor of the Grand Trunk Western, and have been so employed from March 2, 1903 until now. I have been a conductor since 1911.

On February 6, 1937, I was working in the crew with Mr. Lilly. I had had several trips with Mr. Lilly before. On the day before the accident he relieved a man at Holly, [fol. 87] Michigan, which is about thirty-eight miles west of Ferndale. Holly is about forty-three miles from Milwaukee Junction.

I was in the caboose at the time Mr. Lilly sustained the injuries in the accident on February 6, 1937. The fireman came back to the caboose and told me about it. I took the stretcher up there and put Mr. Lilly on the stretcher and carried him about a block, and called up the ambulance and also notified the dispatcher.

After Mr. Lilly was taken away, I did not get up on the deck of the tender at Ferndale. I did get on the deck of the tender at Pontiac, which is sixteen miles west of Ferndale. The claim agent wanted me to go up and inspect the tank, which I did.

There was nothing wrong with the tank when I was up there that I could see.

"Mr. Smith: I think the jury should be told that the first two counts are out of the complaint for clarity.

The Court: All right, tell them.

Mr. Cohen: I have dismissed out of my complaint any negligence regarding the rod or hook and also any negligence regarding the water spout, just confining the charges to the water tank itself.

Mr. Smith:

Q. Now did you observe the deck of the water tank when you got upon it at Pontiac?

A. I did. I did not see any crack in the deck of that tender near or at the manhole, nor did I see anything wrong with the deck anywhere near the manhole when I inspected it."

[fol. 88] I did not see any part of that manhole or deck near the manhole that would appear to leak.

I did not observe whether any part of that deck or the manhole, the deck near the manhole, or the manhole, was rusted worse than any other part of the tender of the engine. I saw nothing wrong with it when I inspected the deck of the tank or the top of it. The purpose of going up there was because I knew he had been hurt while working up there, and I was instructed to go up there by the claim agent to see if there was anything wrong with the tank. I found nothing.

I have seen brakemen and firemen take water from a water spout a number of times. When they are taking water on it slops over if they let the water run over. About the only time I have ever seen it slop over is when you are switching cars or something like that, and hit them good and hard it will slop over.

Cross-examination.

By Mr. Cohen:

I have been with the Grand Trunk about thirty-five years, and I rose from the ranks to the position of conductor. I should think I am well familiar with my duties, or the duties of train crews; I wouldn't have been promoted if I hadn't been. I know Lilly intimately; he has made quite a few trips with me off and on. I absolutely felt bad when I heard he was hurt, and we went to him and did all we could.

We didn't talk about what happened until after we picked him up.

[fol. 89] The fireman came back to the caboose and said that Mr. Lilly fell off the tank and was hurt pretty bad, and that was all there was said.

"Mr. Smith: I move that be stricken as hearsay.
The Court: Strike it."

I didn't go up on the tank until we got to Pontiac; that is quite a ways. It was about four hours before we got to Pontiac from the time the accident happened.

"Q. Did you ever hear that he slipped off the ice on that tank?

Mr. Smith: I object to that, as not cross-examination.
Mr. Cohen: Well it is.
Mr. Smith: And incompetent, and hearsay in the second place.
Mr. Cohen: The company sends the witness up,—oh, well, if that hurts you, I will quit that.
Mr. Smith: I object to the statement of Mr. Cohen, that it hurts me, and I take exception to the highly inflammatory and prejudicial statement of counsel in the presence of the jury.
The Court: Well I cannot agree that it is inflammatory and prejudicial. The remark should not have been made. I do not think it has any effect.
Mr. Cohen: Well, I will withdraw the remark.

Q. Now, Mr. Ferstel, you did all you could for your friend?
A. Yes.
[fol. 90] Q. And then what happened? You moved on to Pontiac?
A. Well, no; we went to Royal Oak and did our work, and went to Birmingham and did our work, and then we arrived at Pontiac."

When we got to Pontiac, Mr. Bishop was there and informed us to get up on the tank and look it over. Mr. Bishop was the Claim Agent for the Grand Trunk at that time. He asked me to inspect the tank on account of the accident. He didn't say anything about how the accident happened; all he knew, he just fell off the tank.

Then I got up there and inspected the tank. I told him I couldn't see anything wrong with it; it was daylight. I climbed up on top of the tank and looked at the hook, and I looked at the manhole cover, and I looked at the top of the tank, and I couldn't find anything wrong with it. There was nothing wrong with the hook that I could see.

I looked at the top of the manhole cover which is the lid that goes on after the water is put in, and I found nothing wrong there. I took the cover off and put it back on and it fitted all right. There was nothing else to do. I inspected the whole tender, the top. I looked at the hook, and I looked at the manhole cover, and I also looked at the band around the manhole that the manhole cover fits in, and I could see nothing wrong with it. I stood up and I bent over and examined it, looking to see if there were any defects in there.

It was along about 12:30 or 1:00 o'clock when I got to Pontiac. There was no ice on the tank when I inspected [fol. 91] it. I looked all around it and I couldn't see nothing wrong. The tank has seams all around it. I examined all the seams around the tank. I got down and looked at all of them. Mr. Bishop asked me to examine particularly the band around the base of the manhole. There wasn't any rust around there that I could see. The engine had not been on the job very long; it was in pretty fair condition. I followed the orders that Mr. Bishop gave me as was my duty. He asked me especially to look at the base of that manhole to see if there were any leaks or not; there would be water leaking out if there were leaks, if the water was full enough. If there was a leak there would be water on the top of the tank; there wasn't any leaks there that I saw.

I am a little familiar with the rule book, and have taken examinations on it.

"Q. Now, your rules require you to do everything necessary to operate that train,——

Mr. Smith: I object.

A. Absolutely.

Mr. Smith: Just a moment. I object to it and move the answer be stricken as not cross-examination of the witness.

The Court: Well, he is put on there to all intents and purposes,—go ahead, you can answer that.

Q. And that applies to seeing that the men do the work right, and you look after, in a general way, to see that—the men and yourself look after the brakes, and couplings and things?

A. Certainly, that is why I am there for.

[fol. 92] Q. Is it your duty to inspect the engine and tender?

A. Yes, just as much as it is any other part of the train."

In the crew the engineer and fireman primarily inspect the engine and tender.

I do not have my book of rules with me.

"Q. What is this, Mr. Ferstel (indicating)?

A. Oh, a conductor's book of rules, Canadian National—Grand Trunk Western. That is the same kind as mine.

Q. Will you turn to the rule that governs your duties?

A. I had charge of that train, if that is what you want to know.

Q. I want to see where the rules say that you have to thoroughly inspect the train and inspect that engine, too?

Mr. Smith: I object as not cross-examination, and immaterial about this man's duties as an inspector.

(Discussion between court and counsel.)

Q. Did you take along with you any rod to poke down the drain holes when you went up there?

A. No, I did not; there was none there to poke down that I know of,—any holes."

I never knew of there being any drain pipes on the top of the tank. There are holes in the tank to let the water run out if it is flooded over.

[fol. 93] Redirect examination.

By Mr. Smith:

I think the first trip that engine made on that job was about two months before the accident happened. We got the engine out of Durand in place of 35 or 3415. It came out of the roundhouse.

Recross-examination.

By Mr. Cohen:

I do not know how old this engine was, or whether it was an old or a new one.

I do not know whether it was about to be retired out of the passenger service for age or not.

A. E. Granger, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is A. E. Granger, and I reside at Durand, Michigan. I am a locomotive engineer, and have been an engineer with the Grand Trunk about thirty-five years.

On the 6th day of February, 1937, I was on a run between Durand and Milwaukee Junction in a crew one of whose members was Mr. Lilly. I made the run the day before from Durand to Milwaukee Junction. Mr. Lilly joined the crew on the day before at Holly. Our brakeman from Durand to Holly had been brakeman Thinly. I think he left the crew at Holly on account of sickness. We went into Milwaukee Junction and spent the night, and started out on the morning of the 6th.

[fol. 94] Mr. Lilly met with his accident at Ferndale, and at that time I was in the cab of the locomotive. We were then going west in railroading, but it would really be facing north at Ferndale. The first knowledge I had that Mr. Lilly had met with an accident was when I heard him moaning and calling for help.

I first saw him after the accident on the ground. I immediately got down on the ground and went around to where he was; that would be the left side of the tank of the engine, the tender, which was the fireman's side. I saw Mr. Lilly lying on the ground and I talked to him a little. He was partially out of breath, but he answered two or three questions which I asked him. I asked him how it had happened, and how bad he was hurt, if he knew, slightly, and he told me that the tank or the hook,—what we call the hook, slipped off the spout. Not very much more, if anything, was said. I sent the fireman immediately to the caboose of the train for the emergency cot or stretcher, and I don't know exactly who went to the telephone right near there in an office to call an ambulance. After the fireman came back with the

stretcher from the caboose we put him on it and took him to the ambulance as soon as it showed up.

After Mr. Lilly was put in the ambulance and taken away, I examined this hook. It was on the ground beside Mr. Lilly, and it still lay there when we took him to the ambulance. After that we went back, and the fireman started to take water. I knew that Lilly had been up there starting to take water. The fireman's name was Frank Smith and he had been with me the day before. He took on the water [fol. 95] the day before. Mr. Lilly did not take on any water on the trip the day before.

Afterwards I got up to the top of the ladder that went to the deck, and as the fireman was taking water I told him to see if there was anything loose pertaining to the water spout that would cause the hook to slip off or straighten out, or anything pertaining to anything that would cause the hook to come away from the spout as he pulled it around over the tender of the engine. He couldn't find anything wrong. I did not look about on the deck of the tender as I came up on the ladder. I was up to the top of the ladder where I could see. The water spout through which the water comes into the tender is about ten to twelve inches in diameter.

There is quite a force to the water coming through the spout, but nothing that would cause any damage. The water goes into the tender quite fast. The tender holds 9,000 gallons. It would take approximately three minutes to fill that tank half full, so at that particular spout about 4,500 gallons of water would go through that pipe in my judgment in three minutes time; that is quite a fast spout.

As an engineer, I have duties with reference to turning in a report as to defects in the engine at the end of my run; that is done on a regular work report form.

I find that form in the roundhouse of the terminal where I tie up at the end of my trip. It is at every roundhouse, and there is one at Milwaukee Junction.

[fol. 96] It is my duty every day to report in there any defects at the end of each trip. On the date in question I turned in a report.

Defendant's Exhibit 9 for identification is the report I turned in at the end of the run on February 5, 1937, and it bears my signature down at the bottom; that is my handwriting on the upper left in pen. All of the column headed "Repairs Needed" is in my handwriting. There

is another column to the right entitled "Remarks," which are put by the machinists or boiler-makers or whoever happens to have the duty to do the repairs.

If another member of the crew had informed me that there was any defect in the tender, that defect would have been reported on the left hand column of the work report, where I have written in pen in my handwriting. All I have to do is to write it in there and turn in the engine. Those repairs would be made between the time you arrive at the destination of your trip, until you go out the next morning, or until you start in for another trip back. If a brakeman had reported to me that there was a crack or leak in the tender, it would have been put in that report.

Such a report was not made to me by brakeman Lilly on the afternoon or evening of February 5, 1937. It would have been his duty to report to me any defect if he had observed any up there when filling the water. They usually tell you about it.

"Mr. Smith: At this time, if your Honor please, I want to offer in evidence Defendant's Exhibits 1 to 6, inclusive, for identification, and ask that they be marked Defendant's Exhibits 1 to 6.

[fol. 97] Mr. Cohen: At this time I now make this objection to their being admitted in evidence; that is not the engine at the time.

The Court: Well, they are not admissible if you make any objection, because they have not been properly identified, of course.

Mr. Smith: Well, then, of course, you do not object because the man who took the photographs is not here to testify?

Mr. Cohen: No, I don't.

Mr. Smith: Well, you don't make that objection?

Mr. Cohen: No, but I make the objection that is not the engine at the time.

Mr. Smith: All right. I will connect that up with further proof, if Mr. Cohen insists on that objection.

I offer at this time defendant's Exhibit 7 for identification,——

Mr. Cohen: You don't mean for identification?

Mr. Smith: No, I offer it in evidence. I offer in evidence the document so marked and ask that it be marked Defend-

ant's Exhibit 7, which is admittedly not the engine in question, but one which Mr. Lilly stated was one exactly like the one in question.

Mr. Cohen: Well, I object to that because I think they got to explain—why that was not taken of the engine in question.

Mr. Smith: All right. I offer in evidence at this time the document marked Defendant's Exhibit 8 for identification and ask that it be marked Defendant's Exhibit 8."

[fol. 98] (Defendant's Exhibit 8 being three photographs of the water spout.)

"Mr. Cohen: Well, those, they have been identified by the witness. No objection.

The Court: They may be admitted by agreement."

(Defendant's Exhibit 8 for identification received in evidence as Defendant's Exhibit 8.)

(Defendant's Exhibit 9 for identification, being the locomotive report dated February 5, 1937, of engineer Granger.)

"Mr. Smith: I have no photographs of that engine at that time, but those I have offered I will prove were of that engine made subsequently to the accident.

Now, at this time, I wish to offer in evidence the locomotive report turned in by Engineer Granger on the evening of February 5, 1937.

Mr. Cohen: This, your Honor, is certainly objected to by the plaintiff for the following reasons: This is doubling up on evidence. The purpose of this is to prove an inspection was made of that engine. The question is what inspection was made. The witness testified, and then he reduces it to writing and has it put in evidence. There is his testimony, and this is doubling up, and this cannot be cross-examined, and while I feel clear it is not admissible may I be permitted to call your Honor's attention to——

The Court: Are you objecting to it. If you are, say you are objecting to it.

Mr. Cohen: Yes.

[fol. 99] Mr. Smith: I am not offering that for the purpose of showing that this man made an inspection.

The Court: This witness said that he climbed up the ladder; didn't get up on top of the tender himself; he made a casual inspection and then went somewhere and wrote out a report; it is self-serving; bound to be.

Mr. Smith: Your Honor misses the point that I am driving at. This was the day before the accident. I am trying to show a course of conduct.

The Court: If there was a question of whether or not he made any report, if it was denied that he made any report, then it would be admissible to show that he did, but otherwise it is inadmissible.

Mr. Smith: The objection to this document is sustained?

The Court: For many reasons.

Mr. Smith: Q. Now, Mr. Granger, after you got to Pontiac, did you do anything else with reference to observing the condition of the deck of that tender?

A. I did."

I went up on the deck at the request of Mr. Bishop. We looked over the conditions of the guard rail and the collar around the manhole, and we observed the condition of the deck of the tender up there. I did not observe anything defective or out of order about it in any respect. I did not see any cracks in the seam where the collar is riveted onto the deck of the tender. I did not observe anything [fol. 100] which would appear to be a leak at that point. There wasn't any more rust at that point of the deck of the tender than at any other point that I observed. I didn't see any hole in the collar of the manhole, where the collar joins on to the deck of the tender.

I had been working on that engine for some time; I think about a month, and I had been working as an engineer about thirty-five years. That engine when it first came to me about a month prior to the accident was in very good condition.

"Mr. Cohen: Wait a minute. I object to that. He can describe the condition.

The Court: No, he can answer; not too many details. What was the answer you gave?

A. It was in good condition."

I do not know where the engine came from. It was on the same run when I went on the run the first time, about a month before. In my judgment, it was not very long since this locomotive 3521 had been overhauled.

I have observed the fireman or brakeman taking water from a down spout into the manhole. The water will splatter out as the water nears the top of the tank. The force of

the water would make it splatter, the same as you would draw it out of the faucet, when it gets up to the neck of the manhole; that is because of the force of the water. On the day in question it was quite cold.

[fol. 101] Cross-examination.

By Mr. Cohen:

I have been familiar with that particular engine probably in the neighborhood of three or four years.

I do not know its approximate age, or whether it is an old one or a new one. When I was using it it was in the road service or freight service. I think it has been taken out and put in switching service now. It is not necessarily the practice or custom when engines get too worn out or too old for road service, they put them in switching service on that account. I would not say that was a real old engine. I didn't notice how many patches there were on the tender; I would not say there were no patches on it.

I started out as a fireman and have been promoted, and I know the duties of a fireman and of an engineer. In general, I know the rule about filling water tanks.

"Q. Is it not true that the rule is you are to fill them so they do not overflow?

A. I do.

Q. Now, on the other hand, of course when you say that was overhauled from its appearance not very long back, you had no accurate way of determining about how long back it was overhauled, have you?

A. Not exactly.

Q. Did you know that shortly after this accident it was put in the shop and thoroughly overhauled?

A. I did not."

[fol. 102] When the accident happened I got down on the ground and rendered all the assistance possible to my friend, Mr. Lilly. Then I looked around and got hold of the hook, because he complained that the hook slipped; that hook was all right.

After I put Mr. Lilly in the ambulance, I went back to the top of the ladder that goes to the top of the tank tender, and at the same time the fireman was filling the tank that Mr. Lilly started to do. He finished the job, and I stood at the top of the ladder and looked at the tank.

I did not get off and stand on the tank. I had instructed the fireman to take hold of any parts that might be loose on the water spout that would cause the hook to slip out. At my instruction, the fireman took hold of all parts of the spout that come over the tender, and I also told him to take hold of the guard rail around the tank, if anything was loose; apparently there was not. And while standing on the ladder I cast my eyes over the tank just to see whether everything on the engine was all right.

I noticed a very little ice on the tender. It was part around the manhole of the tender. Then I got down and went on, and later on that trip I got back up on the tender; that was approximately four hours afterward. At the request of Mr. Bishop I made a general inspection. He did not give me specific points as to how to make that inspection, but told me to inspect for leaks that might cause ice on the deck.

Mr. Bishop told me to get up there and to inspect for leaks anywhere that they might possibly be; they are liable [fol. 103] to be anywhere, not necessarily at the base of the manhole; there might be a leak somewhere else. It is not customary for tanks to leak if they are of age.

When I got up there I looked all around for any defects. I looked at the deck of the tank, the guard rail, the manhole and the collar around the manhole. I did not have any implements or instrumentalities, any special glass or any metal prod with me. I was standing when I looked around at all these things.

I inspected the seams of the tank standing up. I saw nothing out of the ordinary with respect to rust. I didn't notice any rust in particular; there might have been some rust; that is all I looked for. I inspected the seams around the manhole collar because he made the remark that he slipped and also at the same time the hook came off the spout.

I was looking for any possible leak. As I stood up and looked down, I looked closely and didn't see any leak.

Redirect examination.

By Mr. Smith:

I am not positive as to how thick the metal is in the tank of the tender; I think about a quarter of an inch.

I know that Defendant's Exhibit 6 for identification is a picture of the tender of 3521.

I think it is a true and correct picture of the rear of that tender, which was the tender that was attached to my engine on the day in question.

Defendant's Exhibit 1 for identification is a photograph of engine 3521, which was the engine on which I was work-[fol. 104] ing that day. I do not know in what respects the coal-dock of that engine has been changed since the date I was working on it; that was not done in my presence. Aside from that it is a true and correct picture of that engine.

I would say that Defendant's Exhibit 2 for identification is a true and correct picture of the manhole on the deck of the tender of that engine 3521, as it appeared on the date of the accident.

I presume that Defendant's Exhibit 3 for identification is a true and correct representation of the deck of the tender on engine 3521, as it appeared on the date of the accident, with the exception of these four light posts. These head-light standards were not on there then; they were put on there for switching purposes since then. With that exception, it seems to be a true and correct representation of the deck of the tender as it appeared on that date, in my opinion.

I think that Defendant's Exhibit 5 for identification is a true and correct representation of the deck of the tender of engine 3521, as it appeared on the date of the accident, except for the headlight and the different shape of the coal tender and the pipe at the rear.

To the best of my knowledge Defendant's Exhibit 4 for identification is a true and correct picture of the manhole on the deck of the tender of engine 3521, as it appeared on the date of the accident, to the best of my recollection.

"Mr. Smith: At this time, if your Honor please, I renew my offer as to the documents marked Defendant's Exhibits 1 to 6, inclusive, having in mind the fact that Mr. Cohen [fol. 105] waives proof of the taking and developing of the picture.

The Court: Yes. Well, do you want to cross-examine on them?

Mr. Cohen: Yes.

The Court: All right."

Recross-examination.

By Mr. Cohen:

I don't know when this picture was taken. I think that that is exactly the same type of manhole on those engines as was on that engine in question; I wouldn't say that for certain that that is the same one. I wouldn't say for sure that the character of the rust or the freedom from rust on here is exactly the same as it was on there. What I mean is that that is the true form, the proper shape of it (referring to Defendant's Exhibit 4 for identification).

Defendant's Exhibit 5 shows this tender changed around somewhat; I don't know how long after the accident that was done.

Defendant's Exhibit 3 shows that some time after the accident that tender was changed.

I am not positive that Defendant's Exhibit 2 is exactly the situation as on that day; I don't know when that picture was taken.

"Mr. Smith: For Mr. Cohen's information, I will state that all of those, and I will prove the fact, will prove if he wants me to, that all these pictures were taken on the 10th day of May, 1939, after that engine——

Mr. Cohen: All of them?

[fol. 106] Mr. Smith: All of those six, those first six, after that engine had been transferred into a yard engine.

Mr. Cohen: Then I object to all of them. They show a nice, shiny new engine, painted and everything else. They are not a correct representation of the engine on that day. I object to them.

Mr. Smith: The witness has pointed out in what respect they are different.

Mr. Cohen: Now if you want a picture of that tank from a catalog or something, I am willing to let it go in, and that manhole, but I do not want a photograph——

Mr. Smith: I have offered a document to which you have objected, of another engine of that exact type taken from the same blueprint. This engine here was made from the same blueprints that that engine was made, but that engine has not been remodeled into a yard engine. That is the document to which you objected and that photograph was taken on November 9, 1938.

Mr. Cohen: Now wait a minute. Maybe we can shorten this. Counsel says, although this was taken over two years afterwards that this is a picture of an engine just like that one. If that serves the purpose I am not going to be technical; let it go in.

The Court: Let me see it. Do you want this in?

Mr. Smith: Yes; I offered it once.

The Court: I admit those four, with the explanation that each witness has given to them, including the plaintiff, three, and that one is four.

[fol. 107] Mr. Smith: In other words, you are admitting in evidence Defendant's Exhibit 1 for identification, 4 for identification, 6 for identification, and 7 for identification.

Mr. Smith: I want to point out to your Honor that this witness has testified that one, four and six, are pictures of engine 3521, the engine in question, after it had been transformed into a yard engine.

The Court: The ones I am admitting, Defendant's Exhibit 7, shows an engine which you say is not the engine but the same type exactly.

Mr. Smith: Made from the same blueprint as the other.

The Court: Defendant's Exhibit 6 is the rear end of what purports to be the tender of 3521, showing 9,000 gallons, nine tons. Defendant's Exhibit 1 it is admitted is the engine 3521 presumably before any changes had been made.

Mr. Smith: No.

The Court: Or after the changes had been made.

Mr. Smith: They changed the coal deck up there.

The Court: Yes, so the engineer and fireman could have a rear view.

Mr. Smith: That is right, in switching.

The Court: Defendant's Exhibit 4 portrays a manhole on top of a tender. Now, I am refusing Defendant's Exhibit 2 which portrays a manhole, which is already covered in Defendant's Exhibit 4, and Defendant's Exhibit 3 is refused because it is admitted by every one that there has a [fol. 108] change taken place mechanically, shows standard lags there to hold a headlight and pipe running flush up against the deck, which the witnesses say enclosed the light, and there is a hook portrayed on the floor, which I don't know whether it is the same one or not.

Mr. Smith: It is not; there is no claim it is.

The Court: Defendant's Exhibit 5 is refused because it is the rear view of some engine showing a change has been

made, with a rear headlight, which must be the engine or some engine transferred into a switch engine.

Mr. Smith: Let them be marked so there will be no mistake. I will mark these and take the identification off. I will have the reporter do that.

The Court: Exhibits 1, 4, 6 and 7."

(Defendant's Exhibits 1, 4, 6 and 7 for identification received in evidence as Defendant's Exhibits 1, 4, 6 and 7.)

Defendant's Exhibit 1, being photograph of engine 3521 and tender. See Abst. p. 109.

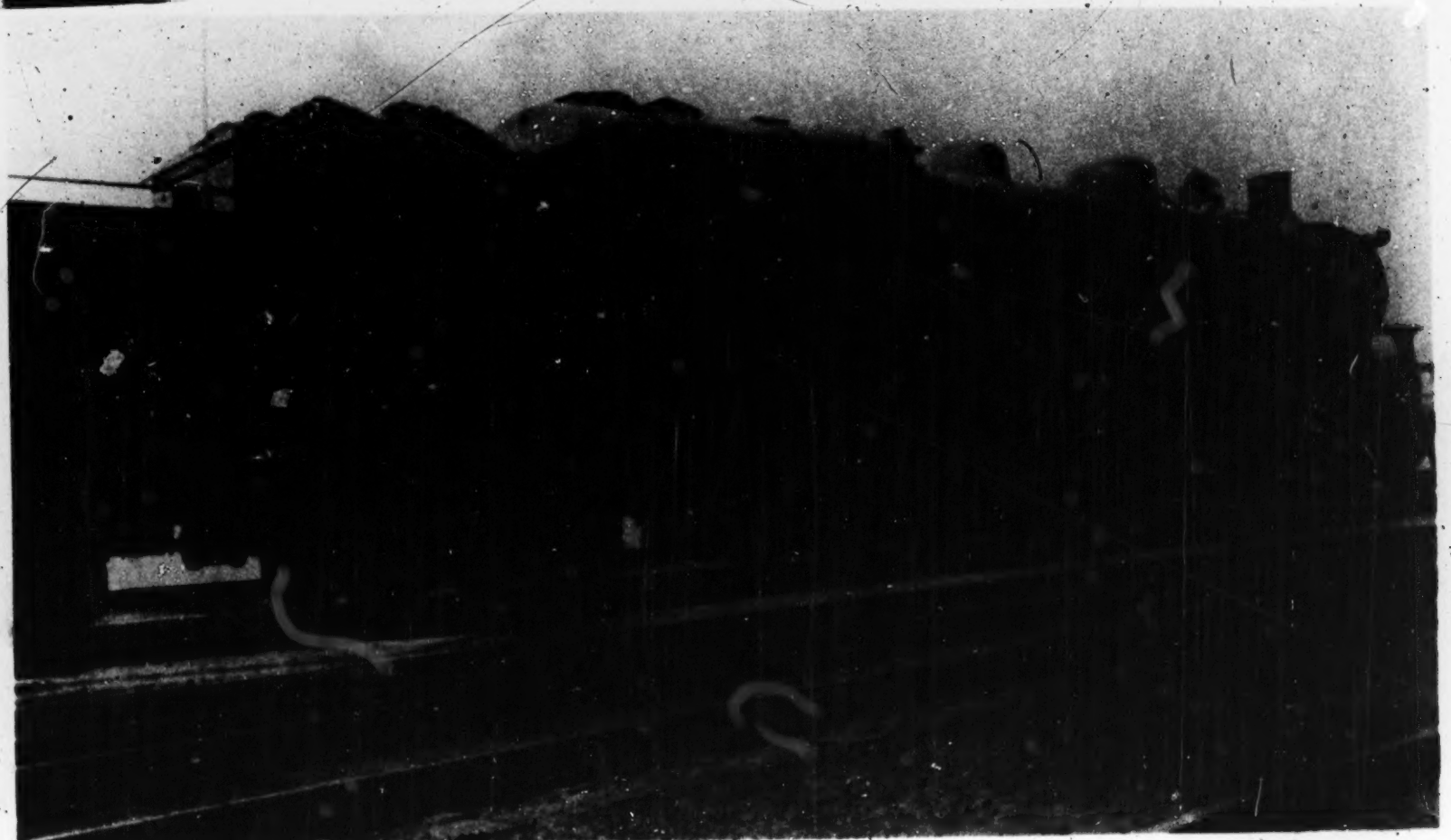
Defendant's Exhibit 4, being a photograph of the manhole on the top of the tender. See Abst. p. 111.

Defendant's Exhibit 6, being a photograph of the rear end of the tender of engine 3521. See Abst. p. 113.

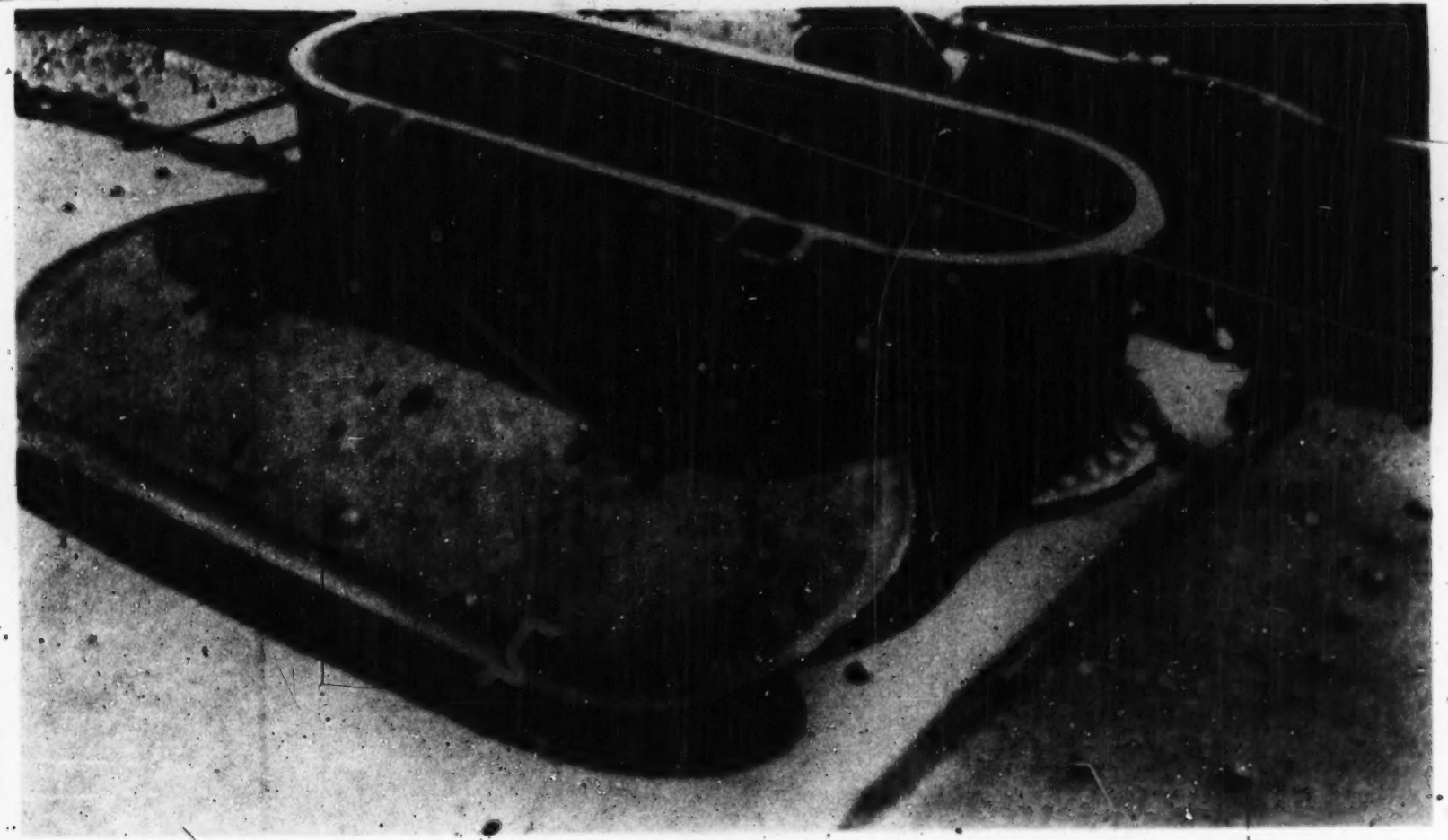
Defendant's Exhibit 7, being a photograph of an engine made from the same blueprint as engine 3521. See Abst. p. 115.

(Here follow 4 photolithographs, side folios 109-110, 111-112, 113-114, 115-116)

DEFENDANT'S EXHIBIT 1



DEFENDANT'S EXHIBIT 4



3521
9000 GALS
9 TONS

[fol. 117] "Mr. Cohen: Just one question, Mr. Granger. Mr. Granger, directly after the accident when you got up on the ladder to look around, that ladder was in the rear of the manhole, was it?

A. Yes, sir."

P. K. Holton, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is P. K. Holton, and I reside at Durand, Michigan. I am a brakeman and conductor; that has been my work for twenty years, during all of which time I have worked for the Grand Trunk Railroad.

On February 6, 1937, I joined the crew at Royal Oak, Michigan, which is about three miles west of Ferndale. My reason for joining the crew at that time was because brakeman Lilly had been injured. I got on the engine at that point.

I first had occasion to get on the tender that day at Pontiac. The first time I got on it for the purpose of inspecting it to see if everything was in proper condition, and the second time I got on it to take water; both times were at Pontiac. I understood that I had inspected it at the request of the man from the claim department. When I got on the deck of the tender, I looked for any defect there might be. I did not find any. I consider that I made a good inspection all over the tender, including the point where the manhole is riveted on to the deck of the tender [fol. 118] and forms a seat. I did not see anything unusual or defective about any part of the manhole or deck. I did not notice any crack or split in the collar of the manhole or at any point where that joins onto the deck of the tender. I did not observe any rust there, any out of the ordinary, at that point.

Just as soon as we had our lunch we came right back and got water. I took water from a stand pipe.

"Q. Did you have occasion to observe whether there was any leak in the tender or the manhole after you had filled it with water?

A. Nothing."

I did not observe any leak there. If there had been a leak there, I would have observed it. I filled the tank up to the neck of the manhole to overflowing, and did not see a leak at any place on the tender of that locomotive at that time after I had filled it with water.

In filling a tender with water of the type of 3521, water ordinarily splashed out of there when it comes in with force. This is a common occurrence. Some times the water comes in there at quite a volume at some points.

Cross-examination.

By Mr. Cohen:

I am a man of family. I have a home and also a garden. I sprinkle the garden with a hose and regulate the water.

There is a regulator on these tanks that shuts that massive stream of water into the manhole, so a fellow can gauge it just the way he wants to.

I am not familiar with the particular rule which requires you to fill it full, and also says you should not fill it to over-[fol. 119] flowing. All I can say is that it is customary to take a full tank of water.

I succeeded Mr. Lilly. I know him personally, just through meeting him in the line of duty.

I think it is about eleven miles from Ferndale to Pontiac. I put water in the tank at Pontiac, and before I did that I inspected the tank. I did not find any ice on the tank, or on any part of it. The weather at that time at Pontiac was moderate; it was above freezing at that time. I examined the tank at the request of the claim agent. His words were to examine the tender for any defects we might find. I looked it over thoroughly, lifted the manhole cover. I did not have any instruments with me. I never saw a manhole cover which was defective so that water splashed out. I looked at the water cover because I was instructed to inspect it thoroughly, and I found it all right. I inspected thoroughly everything I was instructed to inspect on that tank; I looked at the collar at the bottom of the manhole. I would not know what special tools or equipment are necessary to inspect it; I am not thoroughly acquainted with wha. they use for those things.

I bent over to see it; I did not lay my face square on the ground and look underneath nor did I use any tools to do

any prying. I presume the tank was probably half full of water; there wasn't any water up to the top of the tank.

When I filled the tank, I lifted the pipe out of the tank and swung it around. As I shut the water on the water pipe off, I shut down the lid on the manhole and then climbed off the engine. I am sure those are the only things I did when I got through putting the water in. I had to [fol. 120] walk two or three feet to get off the tank. If there was water on the surface of the tank, I would have seen it. I would have had to walk through it. I consider that there would be water visible if there had been any leak. Naturally, I would look down to see where I was walking; I had to walk right around the seam where the collar meets the roof. I did not look there especially.

Redirect examination.

By Mr. Smith:

If there had been water coming out of there, I would have seen it.

"Mr. Smith: Just a moment. I take exception to the demonstration put on by Mr. Cohen, throwing down his pencil and putting on a show for the benefit of the jury.

Mr. Cohen: Listen to that question. The witness said he got down, he could not observe specially, but he could have seen when he walked around, and counsel makes him say when he came down he would naturally see it trickle down that corner. Why, I tell you——

Mr. Smith: I take exception again to the show being put on by Mr. Cohen, throwing a pencil down and making speeches in the presence of the jury.

The Court: Gentlemen, you both know me well enough, I think, to know I do not permit quarreling very much. Just do not quarrel."

[fol. 121] Francis William Smith, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is Francis William Smith. I reside at 308 North Oak Street, Durand, Michigan. I am employed by

the Grand Trunk Railroad Company as a fireman and engineer. I have been promoted to an engineer, but am working as a fireman at the present time.

On the 6th day of February, 1937, I was employed by the Grand Trunk as fireman.

On the day before, February 5, 1937, I made the run from Durand to Milwaukee Junction. The head brakeman on my crew that day was a man by the name of Mr. Lilly. He joined our crew on February 5 at Holly, Michigan. Holly is about twenty-two miles east of Durand. Mr. Lilly joined our crew on account of the disability of the head brakeman we had out of Durand.

On the 5th day of February, 1937, it was my duty to take water into the tender.

"Q. Did you take water in the tender on that engine on that day?

A. I did.

Q. Where did you take water?

A. At Pontiac.

Q. Did Mr. Lilly at any time take water in the tender of that engine that day before the accident?

A. He did not."

[fol. 122] When I took water in the tender of engine 3521, I filled it full. I did not observe any leak in that tender. If there had been a leak in that tender or around the manhole, or the manhole collar, the day before, I would have observed it. I had worked on that engine prior to February 5. I had not at any time ever observed any leak in the manhole of that tender, or in any part of the deck of that tender at any time prior to Mr. Lilly's accident, and that applies to the manhole collar, as well as the deck of the tender. In filling the tender with water, the water comes in there with great force if you open the spout wide open. That is true with the water tower at Ferndale. It is a large pipe there where the water goes into the tender where the accident occurred, and it flows in with great force if you open it up wide. It is a common occurrence for the water to occasionally splash out as it nears the top as it gets up into the neck.

The first time I knew of this accident to Mr. Lilly was when we heard him moaning on the ground. I immediately got down and went to him and asked if I could help him and he said no, that his back was hurt, so I immediately

went to the rear end of the train and got the conductor and the rear brakeman and a stretcher, and we came back and assisted him on to the stretcher and carried him to the crossing, which is almost a city block, and put him in an ambulance.

Immediately after that I had occasion to observe the deck of the tender. I got up on the tender to fill it with water. It had not been filled previous to that at Ferndale by Mr. Lilly. The water was down eighteen to twenty inches at [fol. 123] Ferndale that morning, and I filled it completely full up to the manhole and up to the collar. If there had been any leak in the seam where the collar and the manhole joins on to the deck of the tender, I would have seen it. I did not see any such leak there at that time.

I did not see any crack in the deck of that tender at or near where it joined the manhole collar, nor did I observe any unusual rust at that point, on the deck of the tender. I did not see any hole in the deck of the tender or the manhole collar at that point. I did not observe anything unusual about the equipment or the deck of the tender.

After that at Pontiac I had occasion to get on the deck of that tender. I was requested by Mr. Bishop to do that. We went up on the tender and inspected it thoroughly. We did not find anything wrong with it. We took on water again that day before our trip was completed, at Pontiac.

Mr. Holton took water at Pontiac. I did not have occasion to take on water again that day.

I have had occasion to work on engine 3521 as an engineer at Muskegon, Michigan, since that time. That engine is being used at the present time in yard service, and the deck of the tender has been modified by cutting down the coal space of the tender.

Defendant's Exhibit 7 is a photograph of an engine of the exact type of the engine upon which Lilly was working at the time of the accident.

Defendant's Exhibit 1 is a picture of that engine since it has been remodeled into a yard engine. The coal pit has been cut down to make a runway along both sides for the [fol. 124] purpose of enabling the engineer and fireman to look back.

Defendant's Exhibit 4 is a picture of the manhole of the type that existed on the tender on engine 3521 on that day that Mr. Lilly was hurt.

Defendant's Exhibit 6 is a picture of the rear of the tender of engine 3521, as it appeared on the date of the accident. On the next day, they held that engine in; I think they held it in for six days.

Cross-examination.

By Mr. Cohen:

I can tell by looking at the pictures Mr. Smith showed me what changes were made on that engine, and what changes of construction were made.

They never added anything to it. At that time it went in for overhauling; I wasn't there to see it. I worked on that engine several days after; I know there were no changes.

I worked as a fireman. I did not go around and inspect the nuts and bolts to see whether any changes had been made in those bolts. I did not examine to see if they were marked for test down where the manhole meets the tank, nor did I see whether the rust had been scraped away and new paint put on; I did not look for that.

I don't know that they took the tank apart enough so they could put it back and reconstruct it in that way. I am not a roundhouse mechanic. I am a fireman and an engineer. The man in charge of such repair work would know what mechanical work was done on that engine; I was not in charge of such repair work, nor was I even present. If there had been anything done on that engine, I would have noticed [fol. 125] it in taking water. I don't know what was done on that engine. They did not make an adjustment on the manhole cover. I would have noticed it if they had done so. They didn't have to do anything to the drain pipes; they were open; they did not do anything to them. I know the drain pipe was open because there was no water which stayed on the deck of the tank.

When tanks are filled, and the water is near the top, it is customary for the water to splatter over the top, if they don't shut the pipe down. It is a rule that they should not let the water go over the top, and you can so gauge the flow of the water as to prevent that if you handle it right.

After we had lifted Mr. Lilly in the ambulance, I immediately went up and took water to fill the tank, and I also looked at the tank at that time. Nobody asked me to look at the tank. I looked at it before I filled it up with water, and also afterwards and while filling it to see if I

could find any defects that would have caused Mr. Lilly to get hurt. I knew he slipped off and went off the tank in some way.

I was looking to see if there was anything that would cause that, to see if there was any foreign matter on top or if there was enough ice to cause a man to fall off; that was all I would need to look for. I had to go up there to take water, and when I filled the tank, I looked for a leak so I could report it to the engineer if there had been one; it was my duty to inspect and see if there is a leak. It is my duty to look for leaks at all points on the tender. I absolutely did look at the collar surrounding the base of the manhole of this tank. If there had been any leak there, [fol. 126] that leak would have showed up when I filled the tank with water. I looked all around the tank and all around the collar. I bent down, but I did not use any tools. This was after I put the water in and before also. If there had been a leak, there would be light showing through under the coping, if there had been a leak and you could see.

When the manhole cover is open you can see. You don't need to get down too low to see, and you didn't need to look for a big hole. I was looking for a hole big enough to cause a leak. Water would leak through any sized hole. As I told you before, I bent down to look.

I bent down enough to see if there was a leak there (illustrating); I was looking all around this manhole and on the bottom of the base of it. I will say it took me three to four minutes looking over the tank to examine for that leak before I filled the tank; I went there to look for a leak at that spot to see if there was one; the water was low, and it would not leak if the water was low. If it was frozen up there would not be any leak there.

PERCY A. FINDLEY, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is Percy A. Findley.

"Mr. Cohen: Pardon me. I want the preceding witness for a question.

The Court: All right. Bring him in. He can stand right here, I suppose, for one question."

[fol. 127] FRANCIS WILLIAM SMITH, a witness on behalf of the defendant, having been previously sworn, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Cohen (continued):

I didn't say there was no ice on the tender; you never asked me.

"Q. Was there ice on the tender that day?

A. There was not.

Q. Was there ice on the tender the day of the accident?

A. A very little."

I have seen Mr. Bush, Regional Investigator for the Brotherhood of Railroad Trainmen; he interviewed me some months back.

"Q. Did you make a statement to him?

A. No more than what he asked me and what I gave up to the depot at Durand.

Q. Did you say there was ice on the tender the day before?

A. I did not.

Q. And did you say there was plenty of ice on the tender the day of the accident?

A. I did not.

Q. And did you not say to him that you never looked around; you never were up there to see what happened?

A. I did not."

[fol. 128] PERCY A. FINDLEY, a witness on behalf of the defendant, having been previously sworn, resumed the stand and testified as follows:

Direct examination.

By Mr. Smith (continued):

I reside at 305 O'Brien Street, in Durand, Michigan. I am a brakeman, and have been employed as such a little over twenty years by the Grand Trunk.

In February, 1937, I worked as a brakeman on engine 3521. I first went to work on that engine on the 15th of February and worked until the 26th. In working as a brakeman on that engine I had occasion to get up on the deck of the tender. I took water for the fireman generally. I would take water in the tender on that locomotive on an average of twice per day on a trip. We take water at Pontiac, and take water at Pontiac coming back. I have never seen any leaks in that tender on that locomotive.

"Mr. Cohen: I didn't get that date right, did I?
The Court: What date are you talking about, Mr. Smith?
Mr. Smith: I am talking about the 15th day of February.
Mr. Cohen: That is after the accident.
The Court: What was the day of the accident?
The Witness: February 6th.
Mr. Cohen: I object.
The Court: Sustained.
[fol. 129] Mr. Smith: If your Honor please, I offer to prove by other witnesses later to come in that that engine was not touched in any respect whatsoever between the 6th and the date this man——
The Court: It is premature at this time; I could not permit it.
Mr. Smith: I withdraw the witness at the present moment then.
Mr. Cohen: The way to show condition is to show it at the time, directly afterwards, by inspections.
The Court: I made no ruling on it."

(Adjournment taken to Wednesday, May 24, 1939, at at 10:00 o'clock A. M.)

(The court met pursuant to adjournment.)

Percy A. Findley, recalled as a witness on behalf of the defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Smith (continued):

I am the same witness who was on the stand last night. Immediately preceding February 6, 1937, I was on the east local run, which is the train that runs from Durand to Milwaukee Junction and back.

I started that run on February 5, 1937, and went on that run as far as Holly. I left the crew at Holly because I was sick. During the thirty days preceding February 5, 1937, I had been on that same run with the same engine. There was a regular head brakeman on that run.

[fol. 130] The only reason that Lilly came on that day was because he was on the extra board. I got sick, and he was called in to finish the run. Every time we stopped at Pontiac I took water. We stopped at Pontiac going down and coming back, and I would take water at Pontiac in that tender. In filling that tender, I generally always fill it full, that is, to about an inch from the top of the manhole. I never observed any leak in that manhole or the manhole collar or the deck. If there had been a leak, I certainly think I would have seen it. I left the crew on the 5th at Holly, and I think I went to work again on the 15th of February; I am not sure. I would start on the 15th at Durand on engine 3521. I did not have occasion to get up on the deck of the tender on that day until I got to Pontiac. When I got to Pontiac I did get up on the deck of the tender. I couldn't see any changes that were made on the engine at all. If there had been there would be fresh paint on it. I did not see any fresh paint around there. I did not see any bruises or battering on the rivets or metals. In filling that tender the water occasionally splatters out.

The force of the water going into the tank does that when the tank gets too full; that is separate and apart from running it over. The only time when you run it over you leave the lever up too long and you don't shut the water off. I have had it happen myself. If there had been any leak in that tender, I would have reported it to the engineer. I did not at any time report any leaks or cracks or defects in that tender to the engineer within the last thirty or sixty days; I didn't see any to report.

[fol. 131] Cross-examination.

By Mr. Cohen:

I am still in the employ of the company in the same capacity, a brakeman. When I am head brakeman I always fill that tank on those runs; that is the way we used to do it. We did that on account of taking the engines in the roundhouse. The fireman always took the engine to the

roundhouse and that saved us a big walk. The engine I was working on at the time was an old engine. I don't know how old it was. Later on they took it out of that service and put it to switching; I don't know that they gave it a general overhauling after this accident. I didn't see this engine after the accident until I went to work. I never noticed whether there were any patches on that tender. I always look for leaks. I don't know whether those are my orders, but I always do. Whenever we find a leak, or anything, we report it right away; I do. I don't always look for leaks on the tender. When I get up to put water in that is because the water is low in the tender. When I get up there, I put the water in, and no matter how fast the stream is I can regulate so as to get just enough water in without overflowing if I handle it right, and that is what I usually do and then when I am through I replace the hook and put the lid on.

After I put the lid on, I get down the ladder and get off the tank, and I don't stop and stand around there to see whether in a few minutes or five or ten or fifteen or twenty minutes or less the water is going to trickle out and leak any place.

On that occasion I was off from the 5th to the 15th. The day before, just before I left, before I was taken ill, and [fol. 132] the few times before that when I put water in this engine, I did not get down and look at the manhole. When the water is not up to the top in the tank it cannot possibly leak out at the collar if it isn't full.

PETER FRATTAVOLI, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination:

By Mr. Smith:

My name is Peter Frattavoli, and I reside at 5914 Field, Detroit, Michigan. I am an engine inspector employed by the Grand Trunk, and work at Detroit and Milwaukee Junction, in the roundhouse.

I have been working for the Grand Trunk going on fourteen years, and have been on the particular job of engine inspector for five years.

On February 5, 1937, I was working on that job and inspected engine 3521. That engine inspection consisted of looking the engine all over to see if there was anything wrong or broken, steam leaks or any other defects that happened during the trip, wherever the engine has been working. On my job I do that on every engine that comes in. I do that alone at Milwaukee Junction. It is my routine work to get on the deck of the tender. I do it every day.

Defendant's Exhibit 9 for identification bears my signature at the bottom of the page. It is dated February 5, 1937, and is written up by me after that inspection is made. The remarks in the first column are put in by me. Over [fol. 133] here (indicating) they are put in by the engineer. If I find anything he did not report I put it underneath the engineer's notes. That is my duty. The remarks in the right column are of the man that does the work on the job. This is the original document signed by me after the report of February 5, 1937.

"Mr. Smith: If your Honor please, I offer this in evidence and ask that it be marked Defendant's Exhibit 9.

Mr. Cohen: May I see it? That is objected to. It has no place here, because the witness tells what he did there, puts it down in writing, and that is repeating his evidence. His testimony is the best evidence.

The Court: I ruled on that yesterday after the engineer identified part of it. Now the other part is identified by the repair man here. That document is inadmissible. It could be used to refresh their recollections.

Mr. Smith: Yes.

Mr. Smith:

Q. You have looked at this have you, Mr. Frattavoli, to refresh your recollection?

A. Yes, sir.

Q. If there had been any defects on that tender would they have been written down here by you?

A. Written on the slip right there."

At the time I make that inspection the tender is filled when they come in. The engine hostler who brings the engine in the house fills it. He fills the tank with water before he brings it in the roundhouse. I recall having inspected this engine on other dates preceding the 5th of

[fol. 134] February. For the preceding thirty or sixty days I inspected it every other day. That was the regular engine on the local run. I did not see any rust around the seam where the manhole is riveted on to the deck of the tender at the time I got it. I did not see anything out of the ordinary in any respect or character. If I had it would be on that slip. My testimony has to do with locomotive engine 3521, which is the engine referred to on this slip, from which I have refreshed my recollection.

Cross-examination.

By Mr. Cohen:

I have been in the employ of the company thirteen years and started in the capacity of machinist and graduated to inspector of engines. That is what is known as superficial inspections after every run. When an engine is about to start out on a run it gets that kind of an inspection to be sure that everything is safe, so if an engine goes out every day, it is inspected once a day, that is, when it comes back from the work.

If it comes back at night, they inspect it that night. After it leaves the ash pit at night the hostler takes hold of it and fills the tank with water. It has already been to the coal chute after it is all cleaned, and then the hostler takes her and takes her around and fills with water and takes it on the turntable and puts it in the house. It is used whenever they get ready to use it. When my turn comes I inspect it and report the work whatever it may be; I couldn't say what time I inspected it. It may come in at three o'clock, and I may get her at five, an hour or two afterwards.

[fol. 135] I am on duty eight hours, and the number of engines I inspect run all the way, ten, twelve, fifteen or eighteen. I have to look the engine and tender all over.

I have got to go all around, and underneath, the engine, and the rail and back of the tender. In other words, I am responsible for the engine,—any defects, and I get a slip and put down when I got through with it, after looking the engine all over; no matter what I find wrong I put it on the sheet. The night foreman makes a copy of it, and he puts men to work and the engine is worked all over before it goes out again, to do the repairs or to do whatever I find wrong with it. When I first start, I walk around the engine looking at everything, and I get down underneath to look, and

when I get through I back out. I start at the front end, right side, for instance, and go all the way around, the right and the left side. I go underneath and then I go up on the fender, the running board around the boiler and up with the tank. When I get up on the tender I go all the way around to see if there is anything wrong with it. I use my eyesight to detect if there is something wrong, and I have a little hammer to test it also. On the tender I tap to see if there is something wrong with it, such as loose nuts or broken pipes. If I don't see anything wrong, I don't use the hammer. That is my business and I always do it to inspect every little thing about its engine and tender where danger might arise. There are a thousand things; I couldn't tell how many; it takes me on an average of twenty minutes or a half hour or three-quarters of an hour to make these inspections; it all depends on what kind of an engine it is. I [fol. 136] still work on this engine inspecting it. I don't know where it is now; I haven't seen it for maybe a year or so, I guess. It is an old engine, but I don't know how old it is; I don't recollect how many patches there were on the tender. The collar which is fastened at the bottom right on top of the tank,—the collar of the manhole as the manhole rests squarely on the tank, runs around the manhole; I think it is around twelve or fourteen inches high, where the part that rests on the tank is joined together, the base of the collar is about a half or three-quarters of an inch up to the rivets.

There is a ladder on the back of the tender. After I get up on top of the ladder, I walk all around the tender. I do that work days or nights, whichever I may work; if this engine came in at night, I would do it at night. I use an extension cord, on an electric light, which I bring right around with me when I am walking around and gazing on everything, pointing the light so as to afford illumination.

When I have eighteen engines, I am naturally pretty busy, and when I have ten I am not so busy; I always try to get my work done; it is my regular work and I have got to go through with it; whether I have ten or twenty I got to look for defects, anything around it, I got to see anything; it is my duty to inspect the gauges.

"Mr. Cohen: Well, that is to say, if you see something wrong with your eyes, then you go to work on it, is that right?

A. That is with reference to parts broken, steel parts such as water lugs or steam cock or something like that, or [fol. 137] the injector which supplies water into the boiler. I got to try them out, not only look at them but try them out.

Q. If there is nothing wrong on the tender, there is nothing to do?

A. No, just see if there is any leak, the handrails in good condition, and everything."

The engines are inspected on every run, but they have periodic full inspections and tests once a month and every six months. Another gang attached to that work does it, and they are the ones who have hammers and tongs and all sorts of things that they test every little thing about the engine with.

I didn't see the engine after it came back from the shop.

HAROLD NORTON, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is Harold Norton, and I reside at Burnham, Michigan; I am a machinist employed by the Grand Trunk Western, and have been employed by that company about twenty years; I have been employed as a machinist fifteen years.

Burnham is about four miles from Durand. I am working now at Durand as a machinist, and was so employed in February, 1937.

Defendant's Exhibit 10 for identification bears my signature as inspector. This document is dated February 6, 1937, and is an original document, being the inspector's [fol. 138] report made of engine 3521 on that date. I have examined that document to refresh my recollection as to what I did on that date. I inspected engine 3521 on February 6, 1937, and I recall the occasion of my inspection of that engine. We were informed by foreman Bell that there had been an accident and that we had to look it over very carefully. We inspected the engine between 11:00, and 4:00 o'clock in the morning. I don't know the exact time.

When we inspected the engine, we inspected the tender and the deck of the tender.

Insofar as inspecting the deck of the tender is concerned, we looked over the manhole cover to see if there were any leaks or anything. I didn't open the manhole cover. I looked around outside where the seam is, where it joins the deck of the tender. I looked over the rest of the tender, the entire deck of the tender, for any kind of a defect; I did not find anything wrong with the deck of that tender. I didn't find any rust around the seam out of the ordinary; I didn't see any holes in any part of the manhole or the deck of the tender. I didn't see any cracks in any part of the manhole or the deck of the tender.

(Discussion between court and counsel.)

This inspection was made in the roundhouse at Durand. I couldn't say whether at the time of that inspection, the tank was full of water or empty.

Cross-examination.

By Mr. Cohen:

I am still a machinist in the employ of the company, and my work requires me to be present in the machinist's shop [fol. 139] at Durand. I remember the occasion of inspecting this engine on February 6, 1937. It was between 11:00 P. M., and probably four in the morning, because I worked nights. It was dark when I inspected this engine. I inspected every engine we worked on when they came in the shops, that is, where there is special work to be done. On this occasion this engine was brought into the shop and the foreman Nels Gooding, that is, the night foreman, or the day foreman Bell, asked me to look it over. Bell was not there, but he left a note for the night foreman to have us look it over. Mr. Gooding told me personally what to do. He said, "There has been an accident with it," and to look the tank over thoroughly to see if everything was okeh. That is all he told me to do. He did not tell me what caused the accident. He told me to look around the manhole where he fell off, to see if there was anything there that he would slip on, like coal or ice or anything. I got up on the top of the tank by the ladder in the rear. I was up there maybe in the neighborhood of five minutes. I had a carbide light and a hammer in my hands when I went up on that tank.

I looked over the top of the tank for any defects, coal, or any objects you might slip on that a man might slip on who was up there taking water, but I didn't find any. I did that by pointing the light around the tank and looking; I bent down to look for defects, cracks or anything. I bent down in this shape and flashed the light around (illustrating). I looked for cracks around the manhole. I was not ordered to look for cracks there, but was looking to see if there was any water or anything on there to spill over. I did not use my hammer or any instrument to test anything on the top [fol. 140] of that tank. Nothing came to my observation that would require any testing or arouse any suspicion. I didn't do anything to the manhole cover; just looked at it; it looked all right to me. I do not recall any ice remaining on top of the tender at that time; it would be melted off any way by the time I got to looking it over; they got in early in the afternoon. While inspecting the tender, I could see the patches, but I couldn't say how many patches, if any, were on that engine.

CLYDE D. TYLER, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is Clyde D. Tyler, and I reside at Durand, Michigan. I am boiler foreman at Durand; that has been my job since April, 1936. I am employed by the Grand Trunk Railroad in its roundhouse at Durand.

On February 6, 1937, I had occasion to inspect engine 3521. My superintendent, William Bell, told me to make the inspection. I inspected the tank that was involved in the accident. Mr. Bell told me there had been an accident. We inspected the grab irons, the ladder and climbed on top of the tank and looked over the hook to see if there was any dirt on top of the tank, any unsafe conditions. I looked on the deck of the tender and at the manhole. I didn't see anything. If there had been any defects there or cracks in the tender, I would have seen them. If there had been any [fol. 141] cracks or holes in the manhole or collar of the manhole, I would have seen them. That inspection was

made in the afternoon when the engine came in around four o'clock, as near as I can remember.

Cross-examination.

By Mr. Cohen:

I am boiler foreman in the shops, and am over the men there who do that work, and am myself well acquainted with work of that nature. As near as I can remember, I was called on that day by Mr. Bell, somewhere around four o'clock, to inspect this tender; it was daylight. As near as I can remember the weather was cold; I couldn't say whether it was above or below freezing at that time. Mr. Bell said there had been somebody who got hurt on the tender tank of the engine. He says, "When the engine comes in go look her over and see if you can find any unsafe condition."

That is all I remember him saying. He didn't tell me to look at any specific or special place on top of the tender.

When the engine came in it was spotted on one of the pits in the roundhouse. I got up on the tender; I didn't take anything with me when I got up there. I went up the ladder and got upon the rear of the tender and stepped off on the tender. I looked all around on top of the tender, and with my eyes visualized every spot on top of the tender, looking to see if I could find some defect. As far as my eyes could tell, I could not see anything; it took about a half hour to do this. We looked it over thoroughly while standing up and I leaned over too. I bent over to look at the manhole and the guard rail brackets; I opened up the manhole. I didn't [fol. 14[illegible]] see anything. As near as I can recall there was about half a tank of water; there was no ice on the tender. I cannot recall whether it was a sunny day. I did not use any instruments to test anything there.

W. D. Darling, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is W. D. Darling, and I live at Durand, Michigan, and am employed by the Grand Trunk Railroad, and have been for thirty years, off and on.

I am now employed as foreman of machinery, in the afternoon.

On the 6th day of February, 1937, I had occasion to inspect engine 3521.

I was informed there had been an accident by Mr. Bell. He told me to inspect the tank on engine 3521.

We examined the tank all over the top and the hook that they pulled the tank spout around with and everything was in perfect condition. I did not observe any cracks or any holes or any unusual rust on the deck of the tender or on the manhole; the tank was partly empty.

Cross-examination.

By Mr. Cohen:

We made that examination around four thirty, I believe, in the afternoon; it was right around four o'clock. Mr. Bell told me a man had been injured on that engine, and we were to make a thorough inspection of it; I do not recall whether [fol. 143] he told me how the accident happened. I inspected the rod and hook with which you handle the water spout. Mr. Tyler was there at the same time; the three of us were there. We were all there together. I could not say why it was necessary for three of us to inspect the top of that tank, but generally it is three; that was an inspection made on account of the accident. Mr. Bell had a flash light; it was about four o'clock; I didn't have any light.

When we got up on the tender of the tank, I went all over the top and manhole and all that. We made a good examination. We opened up the manhole cover and looked all down in there around the manhole, and we looked at different things like the hook and all that; I didn't see anything wrong. We examined the whole top of the tank, all over the top of the tank where the water,—if there would be any water on the top of the tank or anything like that. There was no water or ice there. I don't recollect whether it was a bright, sunny day. We talked among ourselves when we were on top of the tank there. I don't remember whether there were any suggestions made by either of us as to any special place to look. No tests were made at that time. I examined carefully for rust; there were no patches on top of the tank; I don't recollect about the sides.

I have never had occasion to do much work on that engine and tender. It comes in in the afternoon, and I generally

went home at four o'clock or a little after. I have been working for the company at that place twenty-two years, this last time. I am familiar with all of the engines on that division. I don't believe that when I started to work this [fol. 144] engine was running at Durand; it was at Battle Creek.

I don't know how old the engine was; they converted her into a switch engine, but I couldn't say on what date that was done. An engine always has its own number, and the number of the tender is the number of the engine it accompanies. Tenders can be taken off engines and put on other engines, and that is done occasionally.

Re-direct examination.

By Mr. Smith:

As far as I can remember the tender on engine 3521 had never been changed.

James Russell, a witness on behalf of the defendant, having been first duly sworn, testified as followed:

Direct examination.

By Mr. Smith:

My name is James Russell, and I reside at *at* Thompsonville. I lived at Durand when the accident happened. At that time I was a boiler inspector; that had been my work for two years. I have been pensioned off and am now retired from work by the Grand Trunk. I haven't worked for two years.

Defendant's Exhibit 11 for identification bears my signature; that is the monthly inspection, and I performed the part on the boiler; that over to the left of the report was made by the machinist. The machinist stuffs the pots and looks at the engine all over, the valves, and everything like that. It was my duty to inspect the tender of this locomotive, and this report has to do with engine 3521. It was [fol. 145] my job to inspect that tender. We have to let all the water out and see if there is any mud and that the splash plates are tight, and if there is any loose we have got to make them tight. I look all around, tighten everything up,

and look to see if there are any holes or cracks. I go right down through the manhole into the body of that tank; and that is what I did on February 8, 1937. It is dark down there and if there are any holes or anything you can see the light through. I did not find any cracks or holes in the deck of that tender or in the manhole on that day. I did not find any defects of any kind or character in the deck or manhole on that day.

Defendant's Exhibit 11 for identification is Monthly Locomotive Inspection and Repair Report and bears the signature of "J. Russell". There are three cards made out. This is one of the three documents made out, and is made under oath.

"Mr. Smith: I offer this in evidence, if your Honor please.

Mr. Cohen: I would like to see it. That is objected to for the same reason, and the courts have specifically held that these reports are not admissible, because they are a repetition of just what the witness testified.

The Court: The objection will be sustained for the same reason."

I did not find anything defective in the deck of the tender.

Cross-examination.

By Mr. Cohen:

I worked for the company twenty-five years, and now am retired on a railroad pension run by the Government; [fol. 146] I was a boiler inspector for about two years. Before that I was just a boiler maker in the roundhouse. I had been familiar with this engine five or six years, I guess; it was not such an awful old engine; I would say it was about twenty years old.

"Q. When engines get old they usually take them out of road service and put them in switch service, do they not?

A. Not the road engines. They send them to the back shop every year to be overhauled, and put them back on the road again."

When these engines are in service they are inspected every month, and that was what I did.

This engine came in on February 8th in its regular monthly turn for inspection.

When I inspected that tender, I climbed up the top on the rear ladder and took the lid off the manhole, and climbed down in the tank which was empty of water.

The day was middling and cold. I weigh about 235 pounds, and am five feet eight, tall. My breast measure, I think, is 46. The manhole is about four feet long and a foot and a half wide.

It is about eight or ten inches high from the tank up to the top of the manhole. When I got inside I had an electric light. While inside I looked to see if any of the splash plates are down, or if there is anything broken inside which needs to be repaired. There was nothing wrong with it or I wouldn't sign the form; there was some scale in that tank. As I looked around I looked for leaks. The manhole cover [fol. 147] was off. It was open so there was daylight streaming in through there. You let the electric light down by your side and you look up; the electric light don't show up there. I examined around the collar of the manhole especially, but no more than I do any other engine.

"Q. Did any one ask you to examine that specially, that engine?

A. No, no more than I do any other engine."

On top you can see the rivets up there and see if the heads are broken off on the inside. I looked around to see if there were any rivet heads broken off or anything; I didn't see any holes in there. I can't say that I looked particularly to see if there is any hole through the neck; I didn't see any. A hole can be large or small.

"Q. If a hole is fairly small it can be clogged up with coal dust, can't it?

A. Not very well, because the hole, when they fill the tank generally they run the tank over, and it will be washed away.

Q. Suppose it is freezing weather and there is water in one of the holes which had been leaking, it is freezing weather, then the water in the hole would freeze, and then of course you could not see through it, that is right, isn't it?

A. If you look at it that way you could say it was.

Q. Yes. You don't take any instruments to do any measuring or prying to determine whether the seam was tight there; you just looked inside, is that right?

A. There is tar paper when it is put together; they put [fol. 148] tar paper in and put hot rivets through. That melts the tar and forms a cushion there and the rivet is drove and it pulls them tight.

Q. You didn't use any instruments inside?

A. No; I just used my eyes to see.

Q. Did this tender have any patches on it?

A. Not that I know of."

There were no patches on top of there, but I wouldn't say whether there were any on the side.

Re-direct examination.

By Mr. Smith:

The inspection was made inside the roundhouse.

FRANK H. MORGAN, JR., a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is Frank H. Morgan, Jr., and I am a court reporter by profession.

On March 7, 1939, I acted as Commissioner before whom depositions were taken in the case of Lilly against the Grand Trunk Railroad.

"Mr. Cohen: This gentleman is the reporter selected by the counsel for the company to take testimony, and he took it.

Mr. Smith: You will let me read it without proving his notes, is that right?

Mr. Cohen: All right.

Mr. Smith: It is agreed between counsel that on the deposition taken before Mr. Morgan as Commissioner the following questions and answers—

[fol. 149] Mr. Cohen: No, the stenographer will testify that those questions were asked and those questions were answered.

Mr. Smith: That is right, as follows:

'Q. What branch of the service were you in in the army?
'A. The 33rd Division, Engineers.
'Q. When were you discharged?
'A. In June, 1919.
'Q. After that what did you do?
'A. (No response)
'Q. When did you first get regular employment again?
'A. I didn't go to work for quite a while after that; I don't just remember.
'Q. Were you married at that time?
'A. Yes, at that time.
'Q. Would it be four or five years before you got employed anywhere?
'A. Well, yes, because I was in no hurry about getting a job.'

Then again:

'Q. Yes. When did you first get regular work?
'A. Well, that was it, the first regular work that I hung on to.
'Q. That was when?
'A. That was when I went railroading.
'Q. I mean when you came back from the army, you were in the army until the summer of 1919?
[fol. 150] 'A. Yes, 1919. That is when I came to Michigan.
'Q. Then there was about five years after that that you did not do anything, is that right?
'A. Yes.'

Mr. Smith: That is all, Mr. Morgan."

William Bell, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is William Bell; I reside at Durand, Michigan. I am a locomotive foreman on the Grand Trunk, and have been working for the railroad thirty-two years. I have been

a locomotive foreman at Durand two years and a half. Prior to that I was gang foreman at the same roundhouse, and also in Detroit.

I was locomotive foreman on February 6, 1937, and on that date I had occasion to inspect engine 3521 on account of knowing there had been an accident, someone injured.

Mr. Smith, the locomotive foreman at Detroit, told me there had been an accident, and when that engine came in I got my two gang foremen, Tyler and Darling, and I took them to the tank of this engine and got up on top and made a thorough inspection of the tank deck on top, the ladder, the guard rail and the coping and manhole. I did not observe anything defective about any of that equipment. All of the appliances were in first class condition; there were no cracks or defects at the manhole. I did not observe any [fol. 151] excessive rust at that point; there was nothing which might have accounted for the accident which I referred to. Engine 3521 was held in the roundhouse for nine days for the Federal Inspector to come and make his inspection if he so desired. When we have an accident on the railroad, and an engine is involved, the Federal Inspector is supposed to be notified immediately, which I did, at Ann Arbor, Michigan, and also at Toledo, his headquarters. This man was out on the road and it was somewhat difficult to contact him, and I didn't get word until the Saturday previous to the Monday the engine went back into service. I got word on Saturday from the Government man, and it went back to work on Monday, the 15th of February. I was locomotive foreman at the roundhouse between the 6th and the 15th, and was on duty all of the time regularly. That engine was not touched or modified in any way in that period of time.

"Q. How do you fix the 15th as the date that that engine went out of there?

A. Well, that is the regular run the engine belonged on."

I have records with me showing the date the engine went out again. Those records show every time that engine went in or out of the roundhouse from February 1 to February 21. When an engine goes out of the roundhouse, the engineer and fireman have to sign the appearance sheet, and the engine dispatcher who calls the crew puts his initial or signature on there to signify they were fit for service. The engine number is written down on that sheet too, on the

date the engine goes out. The day the engine last went out [fol. 152] before February 15 was February 5. Granger and Smith were the engineer and fireman respectively; they went out on that engine that day. They both signed that document. The next day after that date that these records show the engine went out again after February 5 was February 15, and those records disclose that no where in between the 5th of February and the 15th had that engine been out of the roundhouse. On the 15th of February, engineer F. E. Wiggins, and fireman F. W. Smith, went out with that engine. During the period from February 6 to February 15 there were not any repairs made on that engine of any kind or character. I couldn't say accurately how long that engine had been in service; I would say probably nineteen or twenty years. Engines run until the machinery becomes defective or the boiler, and then they are immediately scrapped. I would say the average age of an engine of that type is approximately thirty-five years; we have engines in active service that have been in service for that length of time.

"Q. Is twenty years in service for a locomotive engine considered unusually long?

A. Indeed not.

Q. Now what inspections are made, if any, daily, on an engine of that character that is in active service on a run?

A. Well, each shift of the mechanical department have an inspector, locomotive inspector, and he inspects each engine before it makes the following trip, after it has arrived at the terminal, at the roundhouse."

[fol. 153] It is inspected when it comes in the roundhouse before it goes out again on every trip; that is according to law.

Preceding February 6, 1937 engine 3521 arrived back after an overhauling at Battle Creek on January 13, 1937; it was up at Battle Creek approximately a month. I have records with me that fix those dates in my mind. That is a daily record that is kept in my office in my own handwriting, and when an engine is taken out, I make a record of it in there. I have entries showing those dates I have just described, and from that I have refreshed my recollection. After February 6 an overhauling or change was made in engine 3521, in November, 1937, when the engine was con-

verted into a yard engine. There was a big demand for yard power and we didn't have sufficient engines to fill the requirements.

I know Mr. Norvel Lilly when I see him, but I don't know him intimately.

I have seen engine 3521 since it has been converted into a yard engine.

Defendant's Exhibit 1 is a picture of engine 3521 since its conversion. When it was converted into a yard engine, the coal space in the tender which extended to the sides of the tank on either side, was cut away and box tank set on top of the tank to make the vision clear for the engineer and fireman while in yard service. Foot boards were applied to the front of the engine and the rear of the tank and an end ladder clearance going to the back coupler, which is required by law in switch service. A headlight was placed on the rear of the tank, a wire for the light would be [fol. 154] strung through the guide rail.

Defendant's Exhibit 7 is a picture, and is of the same type of tank as engine 3521 had before it was converted. The deck of the tender is a quarter of an inch thick. It is rolled steel. The steel in the collar of the manhole, which is riveted on to the deck of the tender, on engine 3521, is, I would say, three-quarters of an inch thick; that is the usual standard thickness. In other words, the collar of the manhole is much thicker than the deck of the tender.

Cross-examination.

By Mr. Cohen:

I have been a locomotive foreman for something over two years, and before that my work was as machinist gang foreman. By locomotive foreman I mean I had charge of locomotives in the roundhouse. I have nothing to do with construction work, just running repairs.

The men under me make the running repairs, but do not do the general overhauling. When an engine is to be overhauled, it goes to Battle Creek. I keep records in each yard; each engine has its history, its biography, its record, on my report. We hold the reports for two years, and then they are sent to Battle Creek. I have some of the records of 3521 with me, I believe.

That is the roundhouse report of the department I am with. I do not have the history of the engine; that would

be in Battle Creek with the superintendent of motor power. That record is dated and has the date of the manufacture [fol. 155] of the engine and its purchase and everything, so when I am estimating the age I know there is in the company's archives the exact age.

"Q. These engines rust while they are in service necessarily, do they not?

A. Why, I have seen rust sometimes in some cases, but not so very frequently.

Q. Well, it is quite prevalent, is it not, by reason of the fact there is coal and coal dust used on the engine and ferrous metals rust easily because of sulphur in coal?

A. Yes.

Q. And the water and so forth?

A. Yes.

Q. That is why these constant inspections are necessary?

A. That is right.

Q. And some times rust gets in in unseen places, too?

A. That is right.

Q. Did the Federal inspectors inspect this engine?

A. No, they gave me a release on it when I swore that the engine was in safe condition for service, and he inspected the hook that was used on that spout."

I wouldn't swear there were patches on the side of the tank or not. My attention was centered on the top and around the back of the tank. When these engines get to be thirty or thirty-five years old they are not always rele- [fol. 156] gated to yard service. This engine was transformed and transferred into yard service because there was a demand for more engines in the yard. There wasn't a demand for the 3500 class engine on this particular train that this engine hauled; they always have relief engines to fill those vacancies. I wouldn't say that when they need engines in yard service they take the oldest and those most used out of road service and put them in yard service. This engine was given a class 5 repair, which is just light overhauling such as turning driving tires and renewing the bearings and painted the engine and inspected the boiler and tank, and so forth. The overhauling was made at Battle Creek. I was not present when it was done.

"Q. So when you speak of changes on the photograph, you identify them just because you notice these different things they put on, isn't that right?

A. I notice the change and naturally I would know the engines because they were working under me."

I didn't make an inspection to see everything they did, but only observed what I could see visually, so, of course, they may have done other things and patched other things and did other things that were not included in that report.

Getting down to the date of the accident, I got word of the accident, and the first indication I had of it was from the locomotive foreman at Detroit, the last terminal the engine left, and naturally he wanted me to be acquainted with the conditions there about the yards, and I was then waiting for the engine to come in the terminal so I could [fol. 157] make the inspection. I knew the purpose of making the inspection; the law requires it to see if there are any defects,—Federal violations.

It is the job of the inspector making his daily inspection to look around for defects too, when it comes in for overhauling. One inspector will go over it in general, and underneath it in general to see what is necessary.

"Q. Can you tell me why you used three men to go up and inspect this deck that day?

A. Well, I wanted to make positive that what I found was correct, or what they might see was correct. That is usual routine.

Q. You mean when there is an accident?

A. Yes, take the foreman from each department to go along with the locomotive foreman to make the inspection.

Q. If there were no accidents you would go up alone or some other inspector would go up and look at it?

A. As long as there was nobody hurt."

If there were no accidents,—as long as there was nobody hurt, I would go up alone, or some other inspector would go up and look at it. I went up on the tank with my two gang foremen.

"Q. What did you take with you up there, a lantern or tools or a hammer and flashlight?

A. Yes."

I didn't carry anything else. I believe the time of day when I got up on the tender was somewhere around four-thirty in the afternoon.

As far as I can remember, it was clear and cool; I would not specifically state. I am not positive which of we three

[fol. 158] got on the tender first. When I got up there I made a thorough inspection of the tank and the appurtenances.

"Q. You were standing on the tank and you looked around with your eyes carefully to see everything there was to be seen?

A. Well, I naturally would because that is my job, and I have to protect myself, as well as the engine.

Q. Yes. By the way, with your eyesight you didn't see anything wrong, did you?

A. No, I did not.

Q. What other means did you adopt to see if there is anything wrong before carefully examining with your eyes?

A. I didn't examine any other way than making a close observation of the hand rail or the guide rail top of the tank, the ladder and the manhole and the cover."

I examined the complete manhole that way, the casting itself and the hinges on the cover and the base. When I examined the collar on the manhole I didn't stand up continually; I naturally got a close view by getting down low, with a flashlight. In the roundhouse it is not as bright as day; it is not dark, but to get down close to the point where there may be some irregularity, naturally you have to have a light.

"Q. You looked especially around the collar, didn't you?

A. Not especially; I looked the whole tank over.

Q. Did you look especially around the collar?

[fol. 159] A. Absolutely.

Q. What were you looking for?

A. Any crack or loose rivets or any deteriorated spot.

Q. Any place that would leak?

A. Yes.

Q. You have had a lot of experience in that work, haven't you?

A. Thirty-two years.

Q. Did you get any news that there was a leak there?"

I did not get any news that there was a leak there. Looking to see whether there was any leak was included in the inspection of the tank. There was considerable water in the tank; I wouldn't say much; it was not near the top.

"Q. Well, suppose you got a leaky radiator at home and the water is all out of it, can you find that leak by just looking at it and not filling it with water?

A. Not very well, when some of the joints between the sections are leaking or defective.

Q. In other words, it requires instruments and tests, doesn't it?

A. It does."

I made a report of my findings to my superior officer.

Redirect examination.

By Mr. Smith.

A locomotive receives a daily inspection when it is at the home terminal or at the way terminal. It also receives a regular monthly inspection handled by two differential men [fol. 160] who are qualified for that work. Mr. Russell was one of our monthly inspectors at that time.

The reason locomotives are painted is so they won't rust. If there were any repairs made on the tender, or if the collar of the manhole had been repaired or riveted down again, there would not be any new paint put on in the roundhouse. New paint would be put on after the repairs had been made in the back shop or in the erecting shop in Battle Creek, if there was any work such as that done. After this engine was sent to Battle Creek for transformation into a yard engine, I saw it, and I believe I was able to see what changes had been made on the deck of the tender.

Recross-examination.

By Mr. Cohen:

The top of the tender is painted every time the engine gets a general repair or a back shop repair.

"Q. Don't they temporarily patch up a leak by injecting a little white lead or something?

A. When they are making a joint they use lead and paint or varnish, but that would cover the outside."

White lead generally holds for an indefinite time.

Redirect examination.

By Mr. Smith:

A car gets painted when it goes to the back shop at Battle Creek.

"Q. Now is that the sort of a trip that this engine made there from which it returned on January 15, 1937? Had it been in the back shop? Is that what you mean?
[fol. 161] A. It had been to the back shop, but I wouldn't say to what extent or the amount of paint that was applied."

If paint it is applied at that time.

"Mr. Smith: I want to state for the record that these exhibits from which this witness testified to refresh his recollection are available to Mr. Cohen if he wishes to inspect them at any time."

Floyd E. Wiggins, a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

My name is Floyd E. Wiggins. I live at 506 East Clinton Street, Durand, Michigan; and my occupation is that of locomotive engineer, and has been since 1912. I am employed by the Grand Trunk Railroad. I had occasion to operate engine 3521 in February, 1937. That was on February 15 and 16. I have refreshed my recollection from an appearance form we have to sign before the engine is taken out of the roundhouse. The appearance form was signed on that day. That engine had not, to my knowledge, been taken out of the roundhouse prior to the day I took it out within the last ten days or so.

I knew about an accident which had occurred on that engine, and I observed the top of the tender of that engine when I took it out that day. The first reason I got up there was to see how much water was in the tank, and the other reason was because a man had been hurt on the tender from [fol. 162] the top and I looked to see if it was all right that morning; I was the first man to use that engine after the accident.

When I got up there the tender was full of water, right flush with the bottom of the manhole. I did not observe any leaks or any evidence of leaks in the tender at that time.

"Mr. Cohen: Just a moment. That is objected to. That is nine days after the accident.
The Court: Ten.

Mr. Cohen: Ten days. No one can tell. You cannot prove that at a later time it was all right as probative evidence to prove that it was all right on the day of the accident; a million things might have intervened.

Mr. Smith: Of course there might.

Mr. Cohen: Someone might have fixed it, dust could have gotten in there, might be frozen with ice. The question is, how was it on the occasion of the accident and before, not later.

Mr. Smith: The courts have repeatedly held that you can testify in crossing cases and other cases whether flashlights were working after the accident, whether they were working before. I have shown in this record the last engineer who operated this before the accident, what he saw. Here is the first man after, and that is as far as I propose to go. I have accounted for the position, as to what was done with that engine all the time up to the time he took it out, and there I propose stopping. I think it is admissible.

The Court: I think ten days or two weeks is too remote [fol. 163] to tell whether or not it is in the same condition as it was on the day of the run when the accident happened. I will sustain the objection.

Mr. Smith

Q. Did you see any evidence of any repairs having been made to the deck of the tender or the manhole at that point, at the time you first saw that locomotive?

A. I did not."

(Recess until 2 o'clock the same day.)

(The court met pursuant to recess.)

William Bell, recalled as a witness on behalf of the defendant, having been previously sworn, resumed the stand and testified further as follows:

Further Direct examination.

By Mr. Smith:

On the 15th day of February, 1937 I again made a test on the tender of engine 3521 before the engine was dispatched.

"Q. What was its condition as to being filled or empty with water?

Mr. Cohen: I object; that is nine or ten days after the accident.

The Court: If he is insisting on the objection, I will have to sustain the objection.

Mr. Smith: Exception. That is all, Mr. Bell.

Mr. Smith: At this time, your Honor, I want to have this document marked Defendant's Exhibit 12, and I offer it in evidence by agreement of counsel.

The Court: That is the earnings?

[fol. 164] Mr. Smith: The earnings from the year 1934, January down to February, 1937.

The Court: All right, it may be marked, and it may be admitted in evidence by agreement."

(Said document so offered and received in evidence is in words and figures as follows, to wit:)

DEFENDANT'S EXHIBIT 12.

Statement Showing Earnings of Norval H. Lilly, Brakeman, for Period January 1st, 1934 to February 1st, 1937, Inclusive.

Period	Year 1934	Year 1935		Year 1936	Year 1937
			Yd. Time-Road Time		
Jan. 1st Period	—	—		69.85	107.20
" 2nd "	—	26.29	(12.58 + 13.71)	68.83	45.78
Feb. 1st "	—	87.19	(6.29 + 80.90)	118.20	
" 2nd "	—	62.96		109.93	
Mar. 1st "	—	52.16		—	
Mar. 2nd "	11.92(yd)	—		—	
Apr. 1st "	24.43	41.43		—	
" 2nd "	55.88	61.52	(46.55 + 14.97)	29.30	
May 1st "	22.01	33.82	(33.82 —)	96.11	
" 2nd "	—	—		20.80	
June 1st "	—	—		22.85	
" 2nd "	—	—		10.40	
July 1st "	—	—		54.50	
" 2nd "	—	35.27	(35.27 —)	51.71	
Aug. 1st "	—	6.62	(6.62 —)	—	
" 2nd "	—	44.99		9.38	
Sept. 1st "	—	—		—	
" 2nd "	—	14.28		—	
Oct. 1st "	—	27.99	(13.65 + 14.34)	27.06	
" 2nd "	—	92.79		105.19	
Nov. 1st "	—	104.11	(35.32 + 68.79)	87.07	
" 2nd "	—	98.79	(1.35 + 97.44)	79.38	
Dec. 1st "	—	91.40	(36.44 + 54.96)	90.18	
" 2nd "	—	79.99		80.86	
Totals	114.24	961.60		1,131.60	152.98

NOTE: All the amounts shown above, except where designated yard time, covers time worked as a Brakeman.

Office of Chief Timekeeper,
Battle Creek, Mich.
May 23rd, 1939.

[fol. 165] "Mr. Smith: I wish to offer in evidence at this time as Defendant's Exhibit Number 13, the letter dated March 11th, 1938, written by Mr. Lilly and which has already been identified by him. That has not been offered in evidence as yet.

The Court: Is there any objection to it?

Mr. Cohen: No.

The Court: All right, have it marked and read it to the jury."

(Said document so offered and received in evidence, is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT 13

"March 11, 1938, Durand, Mich.

Fred C. Smith, Detroit, Mich.

Def X 13 Def. X 7

DEAR SIR:

I don't know if this letter will be of much good as I don't exactly know how the land lays or who handles the job that I am going to ask you about.

The Express agent that has been here at Durand has been sent to Ann Arbor & that leaves this job vacant here. Of course there is a man on the job here but he has not been assigned to it yet. I don't know how soon I will be able to go to work or can't tell much about it myself. But I guess it won't do any harm to ask you. Do you think there would be any chance for me getting this job. I don't know how the G. T. W. & the American R. R. Express are hooked up [fol. 166] & I thought you may give me a little information on this. Now Mr. Smith this letter is just between you and I & I am now trying to pick myself a job & I don't want to push myself some place that I am not wanted as I know the G. T. W. will find some kind of a job for me when I can go to work. Sometimes I think if I could get to work I would feel better. Just laying around wondering & thinking sure gets a fellow's goat. But I guess I can't help it. I'll have to sit & wait I guess. I hope that you take this letter Mr. Smith as I do & don't think that I am sticking my nose in where I should not. You know a fellow never gets anywhere sitting looking on.

Hope you and your family are all well & ok.

By the way the tulips are out of the ground about ½ inch now. I am kind of anxious as you know I didn't see them last year.

With best wishes to you & yours from all of us.

Sincerely yours, (Signed) N. H. Lilly, 307 Marquette St., Durand, Mich.

Let me hear from you.

Come up if you get a chance."

"Mr. Smith: I will avoid reading them and let the jury take them out with them.

Mr. Cohen: That is all right, excepting this. This is not an exhibit. I merely agreed that this be read in evidence.

Mr. Smith: Let it be considered as read in evidence. It will take us a quarter of an hour to read all those figures in. [fol. 167] Mr. Cohen: Not as an exhibit. Let it be read in evidence and then you can avail yourself of these figures. I object to it going in evidence, it is only a copy. Now, we agreed on the earnings and it can be read into the record.

Mr. Smith: I am entitled to more than that. We have agreed on a document which sets forth his wages.

The Court: All right, let it go in.

Mr. Smith: On the question of the agreement here which was made in court out of the presence of the jury it is understood and it is agreed that the sum of $1375.00——

Mr. Cohen: $1350.00, wasn't it?

Mr. Smith: $1375.00 was advanced to the plaintiff by the defendant after this accident to apply on any claim that he might have against the railroad.

The Court: All right.

Mr. Smith: Now, it is further agreed, is it not, that the amendment to the complaint, being the fifth charge of negligence was filed in this case on the 16th day of March, 1939.

Mr. Cohen: Yes.

Mr. Smith: And with that, if your Honor please, the defendant rests.

(Defendant rests.)

The Court: Is there any rebuttal, Mr. Cohen?

Mr. Cohen: No, the plaintiff rests.

The Court: Both sides rest?

Mr. Cohen: Yes.

[fol. 168] Mr. Smith: Yes, your Honor."

Which was all of the evidence offered or received on the trial of the above entitled cause.

MOTION FOR DIRECTED VERDICT

Whereupon counsel for the defendant moved the Court in writing to take the evidence away from the jury and to instruct the jury to find the defendant not guilty.

Copy of motion of defendant at the close of all the evidence.

Copy of instruction requested by the defendant to find the defendant not guilty.

But the Court denied said motion of the defendant, to which the defendant then and there by its counsel duly excepted.

Discussion between Court and counsel.

Whereupon Mr. Cohen made his opening argument to the jury.

Whereupon Mr. Smith made his argument to the jury.

Whereupon Mr. Cohen made his closing argument to the jury.

CLOSING ARGUMENT

In closing said argument, Mr. Cohen stated:

"Well, now, I can talk a lot, but I will only bore you. The chances are you gentlemen realize many situations here favorable to the plaintiff that I have overlooked or never thought of. When you get twelve men together they can pretty well size up a situation and they can tell when a fellow comes in with a claim that he suffered a broken back when it was not his fault, and that Congress attempted to [fol. 169] fix a fellow like that so he could get something, that no technicalities, unless the law forces them on you, should prevent him from making a recovery and a recovery so that the money will last him the rest of his days.

Suppose he can get a job. He can sell pencils and things like that, but who—not in this day and age or any time—who will hire a fellow with a broken back? Even at a trifling job, who will hire him? He can stand behind a cigar counter and so on, he can get a job like that, but they can get able bodied fellows to do even a cheap job. So, as I say, gentlemen, don't find that there was no leak, or you put him out of court."

Whereupon the Court gave his instructions to the jury.

DEFENDANT'S REQUESTED INTERROGATORIES

Before the beginning of arguments and before jury were instructed and retired to deliberate on their verdict counsel for the defendant tendered the following interrogatory which was later answered by the jury "No":

"*Interrogatory No. 1:*

Was there, at the time of the accident in question, a leak in or near the manhole collar on the tender in question?

Answer. *No.*"

And the defendant, before the arguments of counsel and before the jury were instructed and before they retired to deliberate on their verdict, tendered the following interrogatory:

[fol. 170] "*Interrogatory No. 2:*

At the time of the accident in question if you find from all the evidence that there was ice on the deck of the tender, did plaintiff know of the existence of the ice on the deck of the tender around the manhole as he started to pull the water spout around to fill the tender?

Answer. ——."

But the Court refused to submit said special interrogatory to the jury, to which the defendant then and there duly excepted.

DEFENDANT'S MOTION FOR JUDGMENT, ETC.

And after the jury returned their verdict and within ten days therefrom the defendant filed its written motion for judgment notwithstanding the verdict in words and figures as follows:

"Now comes the defendant, Grand Trunk Western Railroad Company, a corporation, by Winston, Strawn & Shaw, its attorneys, and moves the Court to enter judgment for the defendant notwithstanding the verdict of the jury for the reasons that:

(1) By the answer to the special interrogatory submitted to the jury they have found in favor of the defendant on the charge of a violation of the Safety Appliance Acts. The

verdict of the jury could only have been entered under paragraph 4c of plaintiff's complaint which charged a violation of the Federal Employers Liability Act in permitting ice to be upon the deck of the tender. By the admitted testimony the plaintiff saw the ice and knew the dangers and assumed the risk therefrom.

[fol. 171] (2) There has been a failure to prove that the plaintiff and defendant were engaged in interstate transportation at the time of the accident in question.

(3) The record is devoid of any proof of negligence on behalf of the defendant."

DECISION

On Friday, June 9, 1939, the Court met pursuant to adjournment, and Judge Damron announced his decision on the motion for judgment notwithstanding the verdict, as follows:

"The Court: I think this, that I would be exceeding my authority, Mr. Smith, if I should set aside the judgment of that jury. I think it is a matter of a question of fact for this jury to decide on whether or not the plaintiff assumed that risk. It was pounded into them by you and by Mr. Cohen; they were instructed very thoroughly on assumed risk, and they realized the import of it and they didn't feel that it was a defense,—so they found, that he received his injuries through the negligence of the defendant, and I don't know whether they realized the import of signing that interrogatory or not.

Now, whether there was a crack or not, yet still the question of the Safety Appliance could remain in there if the Court did feel that it was the duty of the defendant to keep the tender clear so that the man might operate. I don't know about that. It might be. Anyway, the motion will be overruled.

I haven't summed it up as carefully as I intended to, but after the trial I have given this case considerable thought. It was a very interesting case.

Mr. Smith: I assume judgment has already been entered on the verdict, and the motion for a judgment notwithstanding the verdict is overruled.

[fols. 172-174] The Court: Yes, it is."

(Discussion between Court and counsel.)

June 28, 1939. Certificate of Court and counsel to the report of proceedings at the trial.

June 29, 1939. Certificate of the Clerk of the Superior Court to the transcript of the record, including report of proceedings at the trial.

Winston, Strawn & Shaw, Attorneys for Appellant.

[fol. 175] In Supreme Court of Illinois, March Term, A. D. 1942

Norvel H. Lilly, Petitioner,

vs.

Grand Trunk Western Railroad Company, a Corporation, Respondent

Petition for Leave to Appeal from Appellate Court of Illinois, First District.

There heard on Appeal from Superior Court of Cook County.

Honorable W. W. Damron, Trial Judge.

Additional Abstract of Record—Filed January 29, 1942

Plaintiff's Requested Instructions

Thereupon, at the conclusion of all the evidence and after argument of counsel, at the request of counsel for the plaintiff the Court instructed the jury as follows, to-wit:

This action is brought by Norvel H. Lilly as plaintiff against the Grand Trunk Western Railroad Company, a corporation, defendant, to recover damages for a violation of two Acts of Congress, known as the Federal Employers' Liability Act, and the Federal Safety Appliance Act.

The Act of Congress known as the Safety Appliance Act provides that:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, [fol. 176] its boiler, tender, and all parts and appurtenances

thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb."

The Act of Congress known as the Federal Employers' Liability Act provides as follows:

"Chapter 2—Section 51. Liability of common carriers by railroad in interstate or foreign commerce for injuries to employees from negligence.

Every common carrier by railroad while engaging in commerce between any of the several States shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

This Act of Congress further provides:

"Chapter 2—Section 53. * * * No * * * employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

This Act of Congress further provides as follows:

"Chapter 2—Section 54. In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of any, of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Plaintiff files his complaint in this case, and he charges that the defendant, Grand Trunk Western Railroad Com- [fol. 177] pany, a corporation, was a carrier by railroad transporting interstate commerce, and that on February 6, 1937, the plaintiff was employed by and was at work for

the defendant as a train brakeman, and that at the time of the happening of the accident to plaintiff complained of, the defendant and plaintiff were engaged in the transportation of interstate commerce, and plaintiff further charges that while so at work on the day mentioned, about the hour of 8:30 o'clock A. M., he was in the performance of his duties as employee for this defendant, at work on the tank of an engine, when, he charges, through the negligent and unlawful conduct of defendant, he was caused to slip and be thrown off the engine tender, to the ground, and to sustain serious injuries.

Plaintiff makes several charges in his complaint. One charge is that the defendant unlawfully violated an Act of Congress relating to locomotive engines known as a Safety Appliance Act: He charges that defendant used on this occasion a locomotive and tender which was in improper condition and unsafe because at a place on the tender where water is supplied, it was cracked, worn and split so as to occasion and permit water leaking from this crack to flood, seep and cover the top of the tender, rendering it likely to freeze, and that such water did freeze on the top of the tender where plaintiff was so at work, and that he was thereby caused to slip and be thrown.

Another charge in plaintiff's complaint is that plaintiff was by defendant required on this occasion to work on the engine tank when this engine tank was unsafe and dangerous because defendant negligently allowed, caused and permitted ice to accumulate and be on the engine tank at the place where it required plaintiff to work, and that thereby, while plaintiff was so at work, on this engine tank, [fol. 178] by reason of this ice he was caused to slip and be thrown, and sustain his injuries, for which he claims damage and brings this suit asking judgment for $75,000.00.

To this complaint defendant, answering, denies every allegation and charge in plaintiff's complaint excepting that it admits it was a railroad corporation and that plaintiff was in its employment as a train brakeman.

Defendant, further answering, says that it was guilty of no negligence which was the proximate cause of plaintiff's alleged injuries.

Further answering, defendant charges that if plaintiff sustained any injuries, such injuries were the result of risks assumed by plaintiff.

Further answering, defendant charges that the sole proximate cause of the claimed accident was a result of contributory negligence of the plaintiff; defendant, further answering, says that it violated no provision of either the Federal Safety Appliance Act or the Federal Employers' Liability Act.

You are further instructed that under the law the defendant was bound to furnish to the plaintiff a locomotive, at the time in question, which was safe to be used, and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk.

You are instructed that the rights and duties and liabilities of the parties to this action are not governed, effected or controlled by the laws of the State of Michigan, where the accident happened, nor by the laws of the State of Illinois, where this action is being tried, but the rights, duties and liabilities of the parties are governed and controlled exclusively by the Federal Employers' Liability Act of the United States.

[fol. 179] This action is brought by the plaintiff against the defendant under the Federal Employers' Liability Act of the United States, and as a matter of right, the action was instituted and prosecuted in this Court, and it is your duty to give to this case the same fair and impartial consideration that you would be required to give to any other case properly brought in this Court.

The defense of assumption of risk is not available to the defendant in any action brought to recover damages for the violation of any Safety Appliance Act enacted by Congress, where the parties are engaged in interstate commerce, and if you find plaintiff was guilty of negligence in this instance, that does not prevent plaintiff from recovering in this action if under the law and the evidence you find the defendant is guilty of violation of a Safety Appliance Act, as charged in plaintiff's complaint.

The burden of proof on the charge of defendant that plaintiff assumed the risk of the accident and injury he sustained is upon the defendant.

The burden of proof on the charge of the defendant that plaintiff was guilty of contributory negligence is upon the defendant.

You are instructed that while an employee engaged in interstate commerce and transportation assumes the usual

and ordinary risks of his employment, he does not assume extraordinary risks arising from the negligence of his employer or his employer's agents or employees, unless he has knowledge of them and the dangers arising therefrom, or unless such negligence and risks incident thereto were so obvious, apparent and open that any ordinarily prudent person, under like or similar circumstances, would have observed and appreciated them.

But you are further instructed that if, under the evi- [fol. 180] dence and law in this case, you find the defendant guilty of a violation of the Safety Appliance Act, as charged in plaintiff's complaint, and that it caused plaintiff's injuries in whole or in part, then the defense of assumed risk is not available to defendant and in that instance you will disregard it as a defense.

You are instructed that in the event you find the defendant did not violate any Safety Appliance Act, but that you do find under the evidence and instructions of the Court, that defendant was guilty of one of the other charges of negligence alleged in plaintiff's complaint, and further find that plaintiff was guilty of negligence contributing to his injury in this case, then plaintiff's contributory negligence does not bar him from recovering in this action but will affect any damages he is entitled to recover, lessening such damages, if any, to the extent that his negligence, if any, contributed to this accident.

You are further instructed that if you believe from a preponderance of the evidence, under the instructions of the Court, that the defendant was guilty of negligent and unlawful conduct in any of the charges made in plaintiff's complaint, and that as a direct and proximate result and in consequence thereof plaintiff sustained injuries, as charged by the plaintiff, and that plaintiff did not assume the risk of his employment, then you should find the defendant guilty, provided, however, that if you find, from a preponderance of the evidence and under the instructions of this Court, that the defendant is guilty of a violation of a Safety Appliance Act, as charged in plaintiff's complaint, then assumption of risk is no defense.

While plaintiff must prove his case by a preponderance of the evidence, still the proof need not be the direct evidence of persons who saw the occurrence of things sought [fol. 181] to be proved, but facts may also be proved by

circumstantial evidence, that is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the other evidence bearing on such facts, constitute a preponderance or greater weight of the evidence.

Under the law of this State, the plaintiff is a competent witness to testify in his own behalf in this suit. The jury should not disregard the plaintiff's testimony merely because he is the plaintiff and interested in your verdict, but you should consider his testimony in connection with all the evidence in the case and give his testimony such weight and credit as you believe it entitled to from all the facts and circumstances in evidence.

The degree of proof required of the plaintiff in this case is that he prove his cause by a preponderance of the evidence. This means that upon the questions of fact which the plaintiff is required to prove, he must have a greater weight, or preponderance, of evidence. But this does not require the plaintiff to prove any fact beyond a reasonable doubt; a fact is sufficiently proved if the jury find that the greater weight of evidence is in his favor.

If, under the evidence and instructions of the Court, the jury find the issues for the plaintiff and that the plaintiff has sustained damages by reason of physical pain and suffering undergone by him as a natural, direct and proximate result of the acts of defendant, as charged in the complaint, then, to enable the jury to estimate the amount of such damages, so caused by physical pain and suffering, if any, it is not necessary that any witness should have expressed an [fol. 182] opinion as to the amount of such damages, but the jurors may make such estimate from the facts and circumstances proved by the evidence, and by considering them in connection with their knowledge, observation and experience in the affairs of life.

You are instructed that if you find for the plaintiff you will be required to determine the amount of his damages. In determining the plaintiff's damages, you should determine the full amount of the damages suffered by him directly and proximately in consequence of such injuries, and you should find the amount of damages to be such a sum of money as will fairly and adequately compensate him for such injuries. In determining the amount of such damages, it is your duty to take into consideration his age, earning

capacity, and the character extent and severity of such injuries, the pain and suffering he has endured up to the present time, and the pain and suffering that it is reasonably certain he will endure in the future, such disability as he has suffered and hereafter will suffer therefrom; you should take into account and consideration the extent to which he has been incapacitated to work and earn money in consequence of said injuries; you should take into consideration the amount of wages which plaintiff has lost from the time he was injured up to the present time directly and proximately in consequence of said injuries, and the amount of earnings as it is reasonably certain from the evidence he will lose in the future in consequence of said injuries; in determining the amount of future loss of earnings, you will be governed by the rule, and it is your duty to determine, the present value of the total amount of such future loss of earnings.

Provided that if you find defendant was not guilty of a violation of the Safety Appliance Act of Congress, but do find defendant guilty under the Federal Employers' Liabil-[fol. 183] ity Act, under the evidence and the law, then, if you find the plaintiff was guilty of contributory negligence, you must diminish the damages in proportion to the amount of negligence you attribute to the plaintiff, if any.

DEFENDANT'S REQUESTED INSTRUCTIONS

And at the request of counsel for the defendant the Court instructed the jury as follows, to-wit:

The Court instructs the jury that if you believe from the evidence that any witness in this case has wilfully and knowingly testified falsely on this trial to any matter or thing material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness except in so far, if at all, as it has been corroborated by other credible evidence or by facts and circumstances proved on this trial.

The burden of proof is upon the plaintiff and he must prove his case by a preponderance or greater weight of the evidence before he can recover. If you find that the evidence does not preponderate in favor of the plaintiff, or if you find that the evidence is evenly balanced so that you are in doubt or unable to say which side has the preponderance of the evidence, or if the evidence preponderates in

favor of the defendant, then in either of said events the plaintiff cannot recover and you should find the defendant not guilty.

The jury are instructed that the instructions given to them in this case are the instructions of the Court and the law of the case which must govern them in arriving at a verdict for either party.

You should not consider the question of damages in this case until you have determined whether or not the defendant is liable under the law for damages of the plaintiff, and if you find from the evidence and under the instructions of [fol. 184] the Court that the defendant is not liable under the law to the plaintiff, then you will have no occasion at all to consider the question of damages. The fact that the Court has given any instructions on the subject of plaintiff's damages, if any, or that the defendant's counsel has discussed such subject, is not to be taken by you as any intimation on the part of the Court or any intimation on the part of the defendant that the defendant is liable for any damages whatsoever.

Sympathy for the injuries and disabilities of the plaintiff, from whatever cause they may have come, should have no influence upon you in determining whether or not the defendant is liable or not liable, or control in any way your verdict. Both the questions of liability and damages are matters to be determined from the evidence and under the instructions of the Court. Prejudice, sympathy or any outside matter should not affect your judgment. In other words, it is your duty to give to every question in the case calm, careful and conscientious consideration, uninfluenced by sympathy or any consideration other than the evidence and the law as given in these instructions.

You should bring to the consideration of the evidence before you your every day common sense and judgment as reasonable men, and those just and reasonable inferences and deductions which you, as men, would ordinarily draw from the facts and circumstances proved in this case you should draw and act upon as jurors under the law as given to you in this charge.

The Court instructs the jury that one of the defenses of the defendant to this suit is that the defendant was guilty of no negligence that was the proximate cause of the injuries charged. If you believe from the evidence and under the instructions of the Court that the injuries received were

[fol. 185] not due to any negligence of the defendant that was the proximate cau of plaintiff's injuries, then the plaintiff cannot recover in this case and you should find the defendant not guilty.

The Court instructs the jury that the plaintiff has withdrawn the charges of negligence in his complaint as to defects in the water spout and the water spout hook; you are instructed, therefore, that there can be no recovery in this suit because of any defects in either the water spout or the water spout hook even if such defects existed.

The Court instructs the jury that one of the charges of negligence against the defendant was that it negligently permitted ice to be and remain upon the deck of the tender. If you find from all the evidence under the instructions of the Court that the plaintiff was guilty of negligence which contributed to cause his injuries and that the injuries were sustained as a result of the defendant negligently permitting said ice to be and remain upon the deck of the tender and not because of any crack or leak in the tender, and if you further find that the defendant was guilty of negligence which contributed with the negligence of the plaintiff to cause his injuries, then it is your duty to diminish the amount which in your opinion under the evidence you believe that the plaintiff herein will be entitled to recover by reason of the negligence of the defendant by an amount in proportion to the amount of negligence attributable to the plaintiff.

Preliminary to your being sworn to act as jurors in this case you were examined by counsel for plaintiff and defendant as to your competency and qualifications to act as jurors in this case. As part of such examination each of you answered all questions put to you by counsel for plaintiff and defendant. Your answers showed that you were [fol. 186] competent and qualified to act as jurors and the parties to this suit accepted you as jurors on the faith and truth of your answers. The answers you then made to such questions in regard to your competency, qualifications, fairness, lack of prejudice and freedom from passion and sympathy, are as binding upon you now as they were then, and should so remain until you are finally discharged from further consideration in this case. It would be improper and unlawful for any of you to disregard the answers that rendered you competent jurors.

Neither by these instructions nor by any words uttered or remarks made by the Court during this trial, does or did the Court intimate, or mean to give, or wish to be understood as giving, an opinion as to what the proof is, or what it is not, or what the facts are in this case, or what are not the facts herein. It is for the jury to find and determine the facts, and this they must do from the evidence under the law, and having done so, then apply to the facts the law as stated in these instructions.

The jury are instructed that if, under the charge of the Court they find from the evidence in this case that the plaintiff is not entitled to recover, then they will not have occasion to at all consider the character or extent of the plaintiff's damages.

You should not draw any inference or come to any conclusion as to what your verdict should be or should not be, or what the evidence proves or does not prove, merely because of the fact that the Court permits you to consider the case and return a verdict for either party. You must not consider any evidence in arriving at a verdict for either party which you have heard but which the Court has afterwards stricken from the record, nor should you consider any evidence which has been offered and which the Court has refused to receive. You are to disregard all state-[fol. 187] ments of witnesses which the Court ordered stricken out, if any. Such statements are not evidence in the case and should not be considered by you. You should not draw any inference whatever from the fact that attorneys in the case have objected during the trial to questions asked or answers made by witnesses. It is the right of the attorneys on either side to object to the introduction of testimony. Such objections raise questions of law to be decided by the Court only.

While you are the judges of the credibility of the witnesses, you have no right to disregard the testimony of any unimpeached witness sworn on behalf of the defendant simply because such witness was or is an employee of the defendant, but it is your duty to receive the testimony of such witness in the light of all the evidence the same as you would receive the testimony of any other witness, and to determine the credibility of such employee by the same principles and tests by which you determine the credibility of any other witness.

The jury are instructed that while the law permits a plaintiff in a case to testify in his own behalf, nevertheless the jury have a right, in weighing his evidence and determining how much credence is to be given it, to take into consideration the fact that he is the plaintiff and that he is interested in the result of the suit.

The Court instructs the jury that there has been no evidence received on the trial of this case to sustain the allegations of Count III of plaintiff's complaint, and there can be no recovery under Count III of plaintiff's complaint.

The Court instructs the jury that there has been no evidence received on the trial of this case to sustain the allegations of Count IV of plaintiff's complaint, and there can be no recovery under Count IV of plaintiff's complaint.

[fol. 188] The Court instructs the jury that there has been no evidence received on the trial of this case to sustain the allegations of Count V of plaintiff's complaint, and there can be no recovery under Count V of plaintiff's complaint.

It is your duty to consider this case and all its bearings the same as you would a case between two private citizens instead of a case in which a railroad corporation is defendant. Railroad corporations are entitled to the same fair and unprejudiced treatment in courts of law as private citizens would be under like circumstances. Sympathy, from whatever source it may come, should have no influence upon you in determining whether the defendant is liable, or, if liable, control in any way your verdict. Both questions of liability and damages are to be determined from the evidence and under the instructions of the Court. Prejudice, sympathy, or any other outside matter should not affect your judgment. In other words, it is your duty to give every question in the case calm, careful and conscientious consideration, uninfluenced by sympathy or any consideration other than the evidence and the law as given to you in these instructions.

The burden of proof is not upon the defendant to show that it was not guilty of the negligence charged in plaintiff's complaint, but the burden of proof is upon the plaintiff to show that the defendant was guilty of such negligence, if any, and this rule of law as to the burden of proof is binding upon the jury and must govern them in deciding this case. The jury have no right to disregard this rule of law on this proposition, or to adopt any other in lieu thereof, but in considering the evidence and in arriving at a verdict for

either party the jury should adhere strictly to this rule of law.

The fact that the Court has instructed you as to the [fols. 189-190] measure of damages must not be taken by you as any indication on the part of the Court that the plaintiff is or is not entitled to recover any damages whatsoever. If, after you have considered all the evidence and have applied the instructions of the Court as to the law, you find that the defendant is not liable to the plaintiff, then you will have no occasion at all to consider the question of damages.

The words "proximate cause" as that term is used in law mean a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred. Applying this law to this cause, even if you believe from the evidence that the defendant was guilty of negligence as charged in some form in plaintiff's complaint, or some count thereof, nevertheless, if you further believe from the evidence that a new, efficient and independent cause intervened between the defendant's negligence, if any, and the alleged accident resulting in the injury to the plaintiff, then the negligence of the defendant, if any, was not the proximate cause of plaintiff's injury, and in such event you should find the defendant not guilty.

Winston, Strawn & Shaw, Attorneys for Respondent.

[fol. 191] RECORD FROM APPELLATE COURT, FIRST DISTRICT, TO SUPREME COURT

Nisi Prius Gen. No. 39 S. 1005

Appellate Gen. No. 40882

Supreme Court Gen. No. —

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD Co., a Corp., Appellant

[fol. 192] At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Seventh day of October in the year of our Lord One Thousand Nine Hundred and Forty-one within and for the First District of the State of Illinois.

Present: Hon. Kickham Scanlan, Presiding Justice. Hon. John J. Sullivan, Justice. Hon. Hugo M. Friend, Justice. Sheldon W. Govier, Clerk. Thomas J. O'Brien, Sheriff.

Court met pursuant to law.
Court opened by proclamation.

No. 40882

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Superior

Be It Remembered, That heretofore on the 3rd day of October A. D. 1939, it being one of the days of said October Term, A. D. 1939, certain proceedings were had in said Court and entered of record in words and figures following, to-wit:

[fol. 193] At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Third day of October in the year of our Lord One Thousand Nine Hundred and Thirty-nine within and for the First District of the State of Illinois.

Present: Hon. David F. Matchett, Presiding Justice. Hon. William H. McSurely, Justice. Hon. John M. O'Connor, Justice. Sheldon W. Govier, Clerk. Thomas J. O'Brien, Sheriff.

Court met pursuant to law.
Court opened by proclamation.

And afterwards, on the same day to-wit; the 3rd day of October A. D. 1939, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 194] In the Matter of the Assignment of Cases to the Second Division Appellate Court, First District, Illinois. October Term, A. D. 1939, Calendar

On the Court's own motion it is ordered that the following numbered cases on the October Term Calendar, A. D. 1939 of said Court be and the same are hereby assigned to the Second Division Appellate Court for hearing and determination, to-wit: 40882: Lilly vs. Grand Trunk Western R. R. Co., a Corp.

And afterwards, on the 17th day of October, A. D. 1939, it being one of the days of the October Term, A. D. 1939 of said Court, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 195] 40882

Norvel H. Lilly, Appellee,

vs.

Grand Trunk Western Railroad Company, a Corpiration, Appellant

Appeal from Cook Superior

This day came Appellee by his counsel and moved the Court for leave to file his briefs in said cause instanter as per affidavit filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 31st day of October A. D. 1938, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 196] 40882

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Superior

Error to ——

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on briefs filed.

And afterwards, on the 15th day of April A. D., 1941, it being one of the days of the April Term A. D. 1941, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 197] 40882

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Superior

On motion of the respective parties hereto this day made in open Court for leave to file a memoranda of additional authorities in said cause instanter. It is ordered by the Court that said motions be and the same *is* hereby allowed.

And afterwards on the 28th day of November A. D., 1941, it being one of the days of the October Term A. D. 1941, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 198] No. 40882

NORVEL H. LILLY, Appellee,
vs.
GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Error to ——

Appeal from Cook Superior

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the Judgment of the Superior Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to said Superior Court to enter judgment in favor of defendant notwithstanding the verdict of the jury. And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs, by it in this behalf expended to be taxed, and that it have execution therefore.

[fol. 199] And heretofore on the same day, to-wit, the 28th day of November A. D. 1941, there was filed in the office of the Clerk of said Appellate Court the written opinion of this Court, which opinion is in the words and figures following; to-wit:

[fol. 200] 40882

NORVEL H. LILLY, Appellee,
v.
GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Appeal from Superior Court, Cook County

Mr. Justice FRIEND delivered the opinion of the court:

Norvel H. Lilly, employed as a brakeman by the Grand Trunk Western Railroad Company, fell from the deck of a

locomotive tender while engaged in the course of his duties and was severely injured. He brought suit for damages against the company under the Federal Employers' Liability Act and the Federal Safety Appliance Act. Trial by jury resulted in a general verdict in his favor for $32,500. The court overruled defendant's motion for a judgment *non obstante veredicto* and entered judgment on the verdict. Defendant has prosecuted this appeal.

The accident occurred in the railroad yards of the defendant at Ferndale, Michigan, on the morning of February 6, 1937. The crew had performed various switching operations and made up a train which was set out on a lead track, after which the engine was disconnected and moved over to an adjoining track to take on water. It was part of Lilly's duty as brakeman to fill the tender with water. The engine having stopped at the water tank, Lilly climbed up the ladder on the rear of the tender, and as he reached the top and stepped around the manhole he found that ice had formed on top of the tender. The operation of taking water required him to pull the waterspout over the manhole of the tender by means of a long pole with a hook attached thereto, which was available for that purpose. According to his testimony he had to kick the hook out of the ice, where it had frozen, and after he had knocked all the ice off the hook he braced himself on the ice where he was standing, with his feet astride, reached for the waterspout and started [fol. 201] to pull it into position over the manhole. The hook slipped when the water spout had come part way round and simultaneously his feet slipped on the ice, causing him to lose his balance and fall over the side of the tender to the ground.

Lilly's complaint charged that the railroad company and plaintiff were working in interstate commerce, and alleged five separate acts of negligence forming the basis of his suit. Paragraph 4a charges that while plaintiff was on the tender of the locomotive taking on water, defendant supplied him with a rod and hook for the purpose of pulling the waterspout around over the deck of the tender, which was "dangerous, defective, turned and twisted and covered with ice." Paragraph 4b charges that the waterspout was defective and dangerous because it was bent out of shape and position. Both of these paragraphs were dismissed on defendant's motion at the close of plaintiff's case, and are therefore not the subject of controversy. Paragraph 4c

charged in general terms that there was ice on the deck of the tender which the defendant carelessly, negligently, wrongfully and unlawfully permitted to be there. Paragraph 4d charged that there was a violation of the Safety Appliance Act, in that the tender leaked and the top thereof was covered with ice and was slippery. Paragraph 4e, which was added as an amendment to the complaint, charged that the defendant "operated the locomotive and tender * * * at the point where the water is supplied to and poured into the locomotive, to be cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, hole and aperture and to flood, seep and cover the top of the tender" where plaintiff worked. Defendant's answer admitted that plaintiff was an employee, but denied that the parties were working in interstate commerce, and also denied the allegations of negligence charged [fol. 202] in the complaint.

Under this state of the pleadings there were only two questions before the jury: (1) the allegation that there was a violation of the Safety Appliance Act, in that the tender leaked and was covered with ice, and slippery; and (2) the general charge of negligence in permitting ice to form and remain on the deck of the tender.

The federal statute upon which plaintiff relied provides that "it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb * * *." (45 U. S. C. A. 79, Sec. 23.)

In support of this theory of recovery, Lilly testified in his own behalf that he had been on top of this tender the day before taking on water at Pontiac, Michigan; that he had noticed water on the tender that day, "coming from some placed on this engine;" and when asked to describe specifically what he saw he testified: "Well, in front of the manhole where the—that is, the hole that the spout is put down into to take the water, right at the seam on top of the tender where the two join together, there was water coming out of there, at the front of this manhole, right at the seam. It was coming out in a stream, not a big stream, just a small stream like spurting out and spreading over the tender. The manhole is about fifteen or eighteen inches

wide and about ten to twelve inches high, about three feet long. The stream of water was coming out from the seam right in front of the manhole, right where the manhole and the top of the tender is riveted together; it was right at the seam, where the two join. It was a very small stream, I will say about like a small nail."

[fol. 203] To rebut plaintiff's testimony defendant produced numerous witnesses consisting of the crew and other trainmen who testified that they had inspected the roof of this tender and found no crack or leak in the deck thereof. Among those who so testified were Francis W. Smith, the foreman who took water on the tender both the day before and later in the day after the accident; Percy A. Findley, a brakeman in the crew prior to the arrival of Lilly; A. E. Granger, the engineer; W. D. Darling, foreman of machinery; P. K. Holton, who filled the tank with water both before and after the accident; Harold Norton and James Russell, inspectors, and several others.

Upon this phase of the case the following interrogatory was submitted to the jury at the request of defendant: "Was there, at the time of the accident in question, a leak in or near the manhole collar on the tender in question?" The jury answered this interrogatory "No," and thus eliminated from the case the claim of negligence as to the leak or crack in the tender.

Plaintiff's counsel argue that the examination of the tender by defendant's witnesses was superficial, and that they could not, by merely visualizing it, accurately determine whether there was a leak in the collar of the manhole where it was riveted to the deck of the tender. It seems to us, however, that this was purely a question of fact which was submitted to the jury, and it answered the special interrogatory adversely to plaintiff's contention. Moreover, plaintiff had testified that the leak was discernible to the naked eye, and that he could see the water streaming out at a point where the collar of the manhole was riveted to the deck of the tender. Defendant's witnesses undoubtedly had the same means of determining whether any leak existed there.

It is also urged that the special interrogatory propounded to the jury was not broad enough to cover the allegations of the complaint, since plaintiff had alleged that "the tender [fol. 204] leaked there," and that defendant had operated the locomotive "with the tender * * * at the part where

the water is supplied to and poured into the locomotive, cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, hole and aperture and to flood, seep and cover the top of the tender.'" While it is true that these allegations are somewhat broader than the language of the special interrogatory, there is no evidence whatsoever to support them other than the testimony of Lilly which has heretofore been set forth in full, and which is confined exclusively to a "stream of water * * * coming out from the seam right in front of the manhole, right where the manhole and the top of the tender is riveted together * * * where the two join * * * a very small stream * * * about like a small nail." This evidence justified the court in propounding the interrogatory of which plaintiff's counsel complain, fixing the leak "in or near the manhole collar on the tender in question." Any broader interrogatory would not have been justified by plaintiff's own testimony.

Plaintiff's counsel evidently appreciated the import of the special interrogatory, because in his closing argument to the jury he made the following observation, "So, as I say, gentlemen, do not find that there was no leak, or you put him out of court." Notwithstanding this argument, the jury, upon the evidence adduced, found that there was no leak, and consequently that there was no violation of the Safety Appliance Act.

By ruling out any leak "in or near the manhole collar on the tender," there remains only one ground in the complaint upon which the jury could have based its verdict of liability against defendant. That was paragraph 4c, which charged that there was ice on the deck of the tender which defendant "carelessly, negligently, wrongfully and unlawfully" permitted to be there. It is conceded that it had not rained or snowed that day nor the day before. The weather was clear and freezing and from these circumstances plaintiff's [fol. 207] counsel now argue that the ice on the tender must have formed through the carelessness of another employe in allowing water to spatter on the deck while filling the tank of the engine before it left Detroit that morning, which froze and formed ice on the way to Ferndale. Plaintiff's counsel are driven to this argument by reason of the special verdict rendered adversely to plaintiff's testimony that the water on the deck of the tender accumulated there through leakage of the manhole. Although it is conceivable that another

employee may have negligently and in violation of the company's rule and usage permitted water to overflow or spatter on the deck of the tender there is no evidence whatsoever to support the argument; It is at best an inference drawn from the fact that it had not rained or snowed that day and therefore the presence of water on the deck, which later formed into ice, could not have gathered there in any other way.

To support a verdict predicated on general negligence in cases of this kind it is always incumbent on the injured party to prove defendant actually had knowledge of the dangerous condition or that it had existed for a sufficient length of time so as to charge defendant with notice. (*Hatton v. N. Y. N. H. & H. R. Co.*, 261 Fed. 667, 669.) In this proceeding there is no evidence to indicate that defendant or any of its agents or employees knew of the ice or that it had been there long enough to charge them with notice. On the other hand, it is clear that plaintiff knew of the water on the tender because he testified on cross-examination that on February 5, the day preceding the accident, he had observed the leakage of water through the collar of the manhole where it is riveted to the deck and that water had accumulated there. Notwithstanding the rule of the company that the discovery of defects must be reported by employees to their superiors, plaintiff said nothing of the leakage which he says he had discovered. The fact remains, however, that he knew of the water on the deck of the tender, and it is equally clear that neither [fol. 206] defendant nor any of its agents or servants had knowledge of this fact.

Defendant's counsel, while stressing these circumstances, take the position that "whether the ice was there through negligence or whether it was there unavoidably," plaintiff cannot recover, because he assumed the risk. Both parties cite numerous decisions in state and federal courts dealing with the doctrine of assumed risk. The law is clear that a suit predicated upon the Employers' Liability Act or the Safety Appliance Act is governed by the rules laid down in federal cases. From the discussion by counsel of the doctrine of assumed risk, and an examination of the leading authorities, it is evident that although the defense of assumption of risk is not a favored doctrine, and should not be extended beyond its reasonable limits,

it was an established part of the law when this suit was instituted and must be applied in cases fairly within the rule. (39 Corpus Juris, sec. 891, p. 689.) And where a servant's assumption of risk is conclusively established it becomes a question of law so as to preclude recovery. From the numerous decisions cited we gather two fundamental requirements necessary to the application of the doctrine: (1) that the injured party must have had knowledge of the defective conditions; and (2) he must have appreciated the danger which caused his injury. (*Hatton v. N. Y., N. H. & H. R. Co.*, 261 Fed. 667, 669; *Seaboard Air Line v. Horton*, 233 U. S. 492, 504; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229; *Boldt* v. *Penn. R. R. Co.*, 245 U. S. 441, 445.)

As applicable to these decisions there can be no doubt that the plaintiff knew of the icy condition of the tender. He so testified, unequivocally. Moreover, he must have appreciated the danger because he also said that "I braced myself good, putting my one leg forward and one leg kind of behind me to brace myself good." The danger of attempting to stand on the icy surface of the tender and pull a heavy implement from one position to another must have been apparent to plaintiff; otherwise, he would not have had to brace himself, as he testified, to avert slipping. [fol. 207] Plaintiff's counsel propound the inquiry as to what the law required him to do when he discovered the slippery condition of the tender, by asking, "How must he extricate himself if he appreciates a danger he cannot evade? Is he required to walk off immediately?" This is not the kind of danger employees frequently encounter when a train is in motion and which requires immediate action, nor was it a situation where an unforeseen risk arose. It is not disputed that all railroad crews carry sand or ashes on the engines, and there is nothing to indicate that plaintiff could not have made the surface of the tender safe before taking water. Under the circumstances we are impelled to hold that plaintiff assumed the risk and that the court should have entered judgment, notwithstanding the verdict as a matter of law.

This action occurred February 6, 1937. After suit was filed, issues formed, the trial concluded with judgment on the verdict and the appeal perfected in this court, an amendment to the Federal Employers' Liability Act became effective by congressional action and the signature

of the president, on August 11, 1939, which by concession removes the defense of assumption of risk in every accident occurring after the amendment to the federal statute was passed, and plaintiff's counsel now urge that this amendment affects and applies retroactively to cases pending on appeal which are not yet finally decided. A considerable portion of the briefs is devoted to a discussion of this question. We find among the decisions some cases where courts have held that if a statute is of a type that can be applied retrospectively the fact that a case is pending on appeal will not affect retrospective application of the new law, but an examination of the decisions convinces us that such statutes deal only with *remedies*, and not with *vested rights*. The Supreme Court of the United States has consistently held, as a fundamental rule of statutory construction, that a statute is not to be given a retroactive effect unless by plain and definite words of the statute such [fol. 208] a construction is unavoidable. In the early case of *United States v. Heth*, 3 Cranch 399 (7 U. S. 399), the Collector of Customs prior to the enactment of the statute in June, 1800, had received certain sums of money for which he was to be compensated on a percentage basis. By the act of that year his compensation was restricted to a commission of 2½% on the amounts collected. Holding that the statute did not affect the prior transactions, the court said (p. 413): "Words in a statute ought not to have a retroactive operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." Later, in *Murray v. Gibson*, 56 U. S. 421 (15 Howard), the court had to pass on a statute of Mississippi, enacted in 1846, which declared that no record of any judgment recovered in a foreign court against a citizen of Mississippi should be received as evidence after the expiration of three years from the time of rendition of the judgment. The Supreme Court held that the statute had no application to a judgment rendered before its passage, and again said (p. 423): "As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only." The same conclusions were reached in *McEwen*

v. Den, 65 U. S. 242 (24 Howard); *Sohn v. Waterson*, 84 U. S. 596; *U. S. v. St. Louis, San Francisco & Texas Ry. Co.*, 270 U. S. 1, 3.)

It seems clear to us that the existence of assumed risk as a defense to a suit at law is a vested right and not a remedy because it affects the liability of a railroad to an action upon which a money judgment may be predicated. The cases relied upon by plaintiff's counsel, as well as quotations from textbook writers, deal almost exclusively with remedies and not with vested rights. The right to a particular remedy may be taken away from litigants by the legislature through amendments which are retrospective, [fol. 209] but the cases are uniformly to the effect that the legislature may not destroy a vested right by enactment of a law which operates retroactively. There is nothing in the amendment to the Federal Employers' Liability Act which would justify the assumption that congress intended to make it operative prior to August 11, 1939, the day on which it became effective.

Lastly, it is urged by defendant that at the time of the accident the way freight did not contain interstate cars, and therefore the parties were not engaged in interstate commerce. We have examined the record on this phase of the case and are satisfied that the contention is not well taken. In view of our conclusion on the other points we deem it unnecessary to discuss the point in detail.

In view of the conclusions herein set forth, we are of opinion that judgment should have been entered on defendant's motion for judgment *non obstante veredicto*, and therefore judgment of the Superior court is reversed and the cause is remanded with directions to enter judgment in favor of defendant notwithstanding the verdict of the jury.

Judgment reversed and cause remanded with directions to enter judgment in favor of defendant *non obstante veredicto*.

Scanlan, P. J., and Sullivan, J., concur.

[fol. 210] [Stamp:] Filed Appellate Court, Dec. 5, 1941. Sheldon W. Govier, Clerk

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, OCTOBER TERM, A. D. 1939

No. 40882

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Appeal from Superior Court, Cook County

Honorable W. W. Damron, Trial Judge

Petition for Rehearing

Edward B. Henslee, Samuel Cohen, Attorneys for Appellee.

Paul R. Brown, of Counsel.

[fol. 211] IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, OCTOBER TERM, A. D. 1939

NORVEL H. LILLY, Plaintiff,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Defendant

Appeal from Superior Court, Cook County

Honorable W. W. Damron, Trial Judge

PETITION FOR REHEARING

Norvel H. Lilly, plaintiff, petitions the Court to grant a rehearing in this cause. He states the ground for this petition is the following point, which your petitioner respectfully suggests that the Court, in its opinion, through inadvertence of counsel for plaintiff, has ignored: That

the Court has misapprehended the law applicable to the facts in this cause in the following respect:

The Interstate Commerce Commission rules governing in conjunction with the Safety Appliance Act known as the Boiler Inspection Act fasten liability in this case as a matter of law.

Paragraph "d" of plaintiff's complaint charges that

"defendant did unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway * * * a tender which was in improper con- [fol. 212] dition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that the defendant required plaintiff to work on the tender * * * when this tender was unsafe because the top where plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life or limb * * *" (Abst. 5).

The provisions of the *Boiler Inspection Act, 45 U. S. C. A., Sec. 23, Pg. 79* are as follows:

"Use of unsafe locomotives and appurtenances unlawful; inspection and tests. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations thereinafter provided for. (June 7, 1924, c. 355, # 2, 4 3 Stat. 659.)"

The Boiler Inspection Act and the rules of the Interstate Commerce Commission which are a part of the Act itself is absolute and unqualified and the duty continuing. See *Southern Ry. Co.* v. *Lunsford*, 297 U. S. 398, 56 S. Ct. 504; *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169.

See *also U. S.* v. *B. & O. Ry. Co.*, 293 U. S. 454, 55 S. Ct. 468, wherein Mr. Justice Brandeis, in the opinion of the Court, says on Page 271:

"• • • Referring to the argument of the states 'that the authority delegated to the Commission does not extend [fol. 213] to ordering the use or installation of equipment of any kind, *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419,' we said: 'The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.' In closing the opinion, we added: 'If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample.'"

From these decisions it is unquestioned that the Boiler Inspection Act is not complete without the rules of the Interstate Commerce Commission duly promulgated under the authority of the Act itself.

The Interstate Commerce Commission, in accordance with the Act of March 4, 1915, amending the Act of February 11, 1911, (Rules And Instructions For Inspection And Testing of Steam Locomotives And Their Appurtenances) promulgated under the head of "Tenders of Locomotives" the following rules with reference to the tender of a locomotive:

"Tenders

Rule 153. (a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. • • •"

Roberts Fed. Liab. of Car., Vol. 2, Second Ed. Appendix V, Pgs. 2068 and 2069.

[fol. 214] The requirements of this rule are mandatory, absolute, unqualified and a continuing duty upon the railroad company not to place the tender of its locomotive in service unless the top of the tender back of the fuel space is clean. One of the dangers in cold weather to the workmen

on top of the tender is the danger of ice being permitted to form and freeze on it from waste water that is left there and not carried off. It is no concern of the plaintiff as to how it got there nor is the highest degree of care of inspection by the company any defense.

If this ice made the top of the tender unsafe because they failed to keep it clean of waste water that would freeze in this type of weather it was a plain violation of this rule; a violation of the rule is a violation of the Act itself, as was said by Mr. Justice Brandeis in *U. S.* v. *B. & O. Railroad Co.*, 293 U. S. 454, 55 S. Ct. 468,

"When the rules have not been complied with which were issued by the Commission the engine is unsafe within the meaning of the Boiler Inspection Act."

While it is true that the jury answered the special interrogatory by saying that there was no leak in the manhole or top of the tender this did not answer the undisputed question of fact that there was ice on top of the tender, which apparently was so dangerous that the plaintiff, while in the performance of his duty, slipped on it and was injured as a direct result of the presence of the ice on top of the tender.

The language of the rule is clear, unambiguous and unqualified. It undoubtedly not only refers to pieces of coal from the tender or other debris which makes it dangerous for a workman to be upon the tender, but it certainly includes the duty of the defendant under the rule of the Commission to keep the top of the tender clean so that [fol. 215] waste water will not accumulate and freeze in the cold season, which is as dangerous as any other obstruction that the defendant might permit to be or remain upon the top of the tender at any time.

While the record is not clear as to the quantity of ice, still it shows clearly that there was sufficient ice to imbed the hook used for pulling the water spout around, and the record further shows that it was all on top of the tender and that is the object which caused the plaintiff to slip. The absence of proof as to the quantity is merely a question of degree, but there was sufficient ice to create the very danger which the rule intended to obviate.

The Safety Appliance Act known as the Boiler Inspection Act involved in this case is probably the most strict in its language and its requirements of any of the Safety

Appliance Acts and under it the railroad company is practically an insurer. See *Lehigh Valley* v. *Beltz*, 10 Fed. (2d) 74, certiorari denied 270 U. S. 641, 46 S. Ct. 205.

In *Brady* v. *Terminal R. of St. Louis*, 303 U. S. 10, 58 Sup. Ct. 426, Mr. Justice Hughes, speaking for the Court, said:

"The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous."

We call the attention of the Court to 45 *U. S. C. A. Sec. 53, Pg. 379* of the Federal Employers' Liability Act which provides that contributory negligence is no defense in any case where there was a violation by the common carrier of any Statute enacted for the safety of employees contributed to the injury.

[fol. 216] Also, *45 U. S. C. A., Sec. 54, Pg. 434*, which prohibits the defense of assumption of risk in any case where there was a violation by the carrier of any Statute enacted for the safety of employees.

While it is true that counsel for plaintiff was not aware of the rules and therefore failed to call it to the attention of the Court below or to this Honorable Court, still, the rules of the Commission being a part of the Act itself as a matter of law the rules, like the Act, are applicable to the proof in the record without being pleaded. If this body of rules, including the rules herein set forth, are part of the Act itself, as was said by Mr. Justice Brandeis in *U. S.* v. *B. & O. Ry. Co.*, 293 U. S. 454, 55 S. Ct. 468, then the Court must take judicial notice of the rules as well as the Act itself. In further support of the correctness of our position in this respect, we call the Court's attention to *Volume 2, Roberts Federal Liabilities of Carriers Sec. 1020*, which is as follows:

"*Judicial notice of orders of Interstate Commerce Commission.* Whenever by an act of Congress power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed

in pursuance of such authority become a mass of that body of public records of which the court will take judicial notice. Thus the courts will take judicial notice of the orders of the Interstate Commerce Commission pursuant to the authority delegated to it in the Safety Appliance Act and other federal safety statutes."

The author cites in support of the text, supra, the following cases:

"*Caha* v. *United States*, 152 U. S. 211, 38 L. Ed. 415, 14 [fol. 217] Sup. Ct. 513; *Jenkins* v. *Collard*, 145 U. S. 546, 36 L. Ed. 812, 12 Sup. Ct. 868; *Knight* v. *United States Land Ass'n*, 142 U. S. 161, 35 L. Ed. 974, 12 Sup. Ct. 258."

See also *Thompson* v. *Mo. Pac. R. Co.*, 15 F. (2d) 28, wherein the Circuit Court of Appeals took judicial notice of the Safety Appliance Act and that under orders of the Interstate Commerce Commission ladders on freight cars have been standardized.

See also *Goulette's Adm'r.* v. *Grand Trunk Ry. Co.*, 93 Vt. 266, 107 Atl. 188, wherein the Supreme Court of Vermont says:

"In actions under the Federal Employers' Liability Act the Courts will take judicial notice of the standards established by orders of the Interstate Commerce Commission pursuant to authority granted by the Safety Appliance Act."

The real question in this application for a re-hearing is as to whether the client is to be penalized for the oversight of his counsel. Such a situation presented itself in the case of *Thompson* v. *Hocking Valley R.*, 45 Fed. (2d) 155 (6th Circuit Court of Appeals), wherein the plaintiff alleged a cause of action under the Federal Employers' Liability Act and under the proof in the case the Court below directed a verdict in favor of the defendant, and on appeal to the Circuit Court of Appeals it appeared for the first time that the proof in the case showed a violation of the Boiler Inspection Act. Because the record was not clear the case was reversed and remanded. The Court took the position that it should not ignore the liability of the railroad company under the Statute merely because counsel did not present such theory. In other

words, it is palpably plain that justice had not been administered in the case simply because of the oversight of counsel for the plaintiff.

[fol. 218] In this case counsel for the plaintiff was merely guilty of oversight in not calling the Court's attention to one phase of the Safety Appliance Act involved in the case, namely, the rule of the Interstate Commerce Commission.

This is not any change of theory in this case because the plaintiff's complaint alleged negligence under the Federal Employers' Liability Act and a violation of the Safety Appliance Act. The undisputed proof in the record showed that there was ice on the top of the tender which was dangerous and caused the plaintiff to be injured. This was a direct result of the failure of defendant to keep the top of the tender clean. In other words, the theory of the case is the same as in the Court below. The proof shows a violation of the rule and the oversight of counsel was not only in the Court below in failing to call the rule to the attention of the Court, but the oversight continued in the brief and the argument before this Honorable Court. It is palpably plain that the complaint, the proof and the applicable provision of the Safety Appliance Act entitles the plaintiff to the judgment which was rendered in the Court below. In the administration of justice where no harm has come to the defendant, the plaintiff should not be penalized because counsel has overlooked an applicable provision of law that was automatically in the case, both the complaint, from the proof in the record and the applicable provision of the Safety Appliance Act.

This statement is amply supported by the cases heretofore cited to the Court on this question. It would be a travesty on justice of this Court to deprive a litigant of his obvious rights as appearing in the record in this cause simply because of an oversight of his counsel.

We are not seeking to change or add to the complaint nor to add or take from the evidence in the record, but [fol. 219] we ask that the Court apply the applicable principle of the Safety Appliance Act, namely, the rule in question, the violation of which is a violation of the Safety Appliance Act itself. See *U. S.* v. *B. & O. Ry. Co.*, 293 U. S. 454, 55 S. Ct. 468, and *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169.

The plaintiff and defendant's witness, Granger, testified as to the presence of the ice on the top of the tender (Abst. 102). This is not denied by defendant nor by any witness, though the crew who were up on the tender were in position to see.

There is no dispute in the record that the defendant slipped on the ice which was on top of the tender in the line of his duty while attempting to take water.

The record shows that there was neither snow or rain and that it was cold the day of the accident and the day before. Plaintiff testified the weather that day was cold and clear and the weather night and day before was cold and clear. It had not been raining at all that day. It was freezing (Abst. 27). These facts are not contradicted nor challenged by defendant.

It was also conceded in the record that before the engine and tender were put into service that morning that the engine is always coaled and water taken and placed in the tender by the hostler (Abst. 29-134).

The presence of the ice on the top of the tender and the fact that the plaintiff slipped on it and was injured is undisputed. As there was affirmative evidence that the ice was not created either as the result of rain or snow the only logical inference is that the freezing was the result of the overflow on top of the tank when the hostler filled it with water. In fact, counsel in its brief at Page 17 says:

[fol. 220] "If there was any ice on the deck of the tender it resulted from water unavoidably spattering onto *onto* the deck of the tender from the force of the water as the water is put in the tender."

We respectfully submit that the order remanding the case to the trial court is a useless gesture and results in merely a loss of time requiring the plaintiff after judgment in the Court below to again present the matter to this Court, and we feel that whatever the judgment of this Court, it should be entered as a final judgment to avoid the unnecessary delay.

Wherefore your petitioner prays that this Court grant a rehearing, and in the alternative if said rehearing is not granted, your petitioner prays that the Court modify its judgment by striking out the order remanding this case and enter a final judgment in this Court so that the plain-

tiff may perfect his Petition For Leave To Appeal to the Supreme Court of Illinois.

Respectfully submitted, Edward B. Henslee, Samuel Cohen, Attorneys for Plaintiff. Paul R. Brown, Of Counsel.

[fol. 221] And afterwards, on the 10th day of December A. D. 1941, it being one of the days of the December Term A. D. 1941, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 222] 40882

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Superior

Error to ——

The Court having considered the petition of Appellee praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby denied.

And afterwards, on the same day to-wit; the 10" day of December A. D. 1941, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 223] In Re Publication of Written Decisions of This Court:

It is hereby ordered that the cases, the numbers and titles of which are given below, the written decisions of this Court filed the 28th day of November A. D. 1941, shall be published in full in the Appellate Court Reports.

And the decisions so filed which are not designated below shall be published by including an adequate abstract of such written decisions. 40882: Lilly vs. Grand Trunk Western Railroad Co. a Corp.

And afterwards on the 30th day of December A. D. 1941; the following proceedings were had and entered of record in said cause, to-wit:

[fol. 224] 40882

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Superior

The Court having considered the motion of Norvel H. Lilly, Appellee in this cause and Plaintiff in the Superior Court of Cook County, for the issuance of the Certificate of this Court that there is fairly involved in the claim of the said Norvel H. Lilly, Appellee in said cause more than Fifteen Hundred Dollars ($1500.00) as per suggestions and affidavit filed herein. And the Court being fully advised in the premises, are of the opinion and Therefore Certify that more than Fifteen Hundred Dollars ($1500.00), is fairly involved in the claim of Norvel H. Lilly, Appellee herein and Plaintiff in the Superior Court of Cook County.

Kickham Scanlan, John J. Sullivan, Hugo M. Friend, Justices.

And afterwards on the same day to-wit; the 30th day of December A. D. 1941, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 225] 40882

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD Co., a Corp., Appellant

Appeal from Cook Superior

Error to ——

The Court having considered the motion of Appellee that the issuance of the mandate herein be stayed until the time

for the filing of a petition in the Supreme Court of Illinois for leave to appeal to review the judgment of this Court in said cause shall have expired, or if such petition shall have been filed within the proper time, then until said petition shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the 23rd day of March A. D. 1942, it being one of the days of the February Term A. D. 1942, there was filed in the office of the Clerk of said Appellate Court, a certified copy of an order of the Supreme Court of Illinois denying the petition for Leave to Appeal in said cause, which said order is in the words and figures following, to-wit:

[fol. 226] IN THE SUPREME COURT OF ILLINOIS, MARCH TERM, A. D. 1942

No. 26610

NORVEL H. LILLY, Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Respondent

Petition for Leave to Appeal from Appellate Court of Illinois, First District

There heard on Appeal from Superior Court, of Cook County

Honorable W. W. Damron, Trial Judge

PETITION FOR LEAVE TO APPEAL

Edward B. Henslee, Samuel Cohen, Chicago, Illinois, Attorneys for Petitioner. Paul R. Brown, of Counsel.

[fol. 227] IN THE SUPREME COURT OF ILLINOIS, JANUARY TERM, A. D. 1942

NORVEL H. LILLY, Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Respondent

Petition for Leave to Appeal from Appellate Court of Illinois, First District

There heard on Appeal from Superior Court of Cook County

Honorable W. W. Damron, Trial Judge

PETITION FOR LEAVE TO APPEAL

. . . . . .

[fol. 228] STATEMENT OF POINTS RELIED UPON FOR ALLOWANCE OF THIS PETITION AND THE REVERSAL OF THE JUDGMENT OF THE APPELLATE COURT

I

The Appellate Court erred in reversing the judgment for plaintiff by misapprehending and misconceiving the scope and effect of the Federal Safety Appliance Act in that the Court failed to apply the rules promulgated by the Interstate Commerce Commission covering the tenders of locomotives which were an integral part of the Safety Appliance Act under the controlling decisions of the Supreme Court of the United States.

Day v. *C. & N. W. Ry. Co.*, 254 Ill. 469
Napier v. *Atlantic Coastline R. Co., et al.*, 272 U. S. 605, 47 S. Ct. 207
B. & O. v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169
U. S. v. *B. & O. R. Co.*, 293 U. S. 454, 55 S. Ct. 468
Beltz v. *Lehigh Valley R. Co.*, 10 F. (2d) 74, certiorari denied 270 U. S. 641; 46 S. Ct. 205

II

The Appellate Court erred in reversing this judgment by applying the common law doctrine of assumption of risk

when such a defense was prohibited by the Federal Employers' Liability Act where there was a violation of the Safety Appliance Act.

45 U. S. C. A., Pg. 379, Sec. 53
45 U. S. C. A., Pg. 434, Sec. 54

[fol. 228a] III

The Appellate Court erred in reversing the judgment for plaintiff in that the Court erroneously eliminated the Safety Appliance Act by reason of the answer of the jury to a special interrogatory submitted by the defendant.

See suggestions.

IV

The Appellate Court erred in reversing the judgment of the plaintiff solely on the motion of the defendant for a judgment notwithstanding the verdict in that the Court failed under such motion to view the plaintiff's testimony in its most favorable light together with all of the reasonable inferences deducible therefrom.

See suggestions.

[fol. 229] Authorities and Suggestions in Support of Points Relied Upon

I

The Appellate Court erred in reversing the judgment for plaintiff by misapprehending and misconceiving the scope and effect of the Federal Safety Appliance Act in that the Court failed to apply the rules promulgated by the Interstate Commerce Commission covering the tenders of locomotives which were an integral part of the Safety Appliance Act under the controlling decisions of the Supreme Court of the United States.

The crucial question arises under the plaintiff's complaint, Paragraph 4(d), which is as follows:

"defendant did unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard a locomotive and tender which was in improper condition and unsafe to operate in the

service, and its condition constituted unnecessary peril to life and limb in that the defendant required, caused and permitted plaintiff to work on the tender of the locomotive of his train on the occasion above charged, in the act of putting water in the tender of the locomotive, this tender was unsafe because the top where the plaintiff was required to work was slippery and covered with ice and other slippery material to endanger his life or limb, and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition on top of the tender and was thrown and caused to fall and be seriously injured." (Abst. 5.)

[fol. 230] Under Rule 13 of this Court, where a breach of statutory duty is alleged, the Statute shall be cited in connection with such allegation. Paragraph 4(d), *supra*, specifically refers to the breach of the Safety Appliance Act in compliance with this rule.

Paragraph 3 of the opinion of the Appellate Court transposes the allegations in plaintiff's complaint and restricts the wording thereof by referring to this charge as follows:

"Paragraph 4(d) charged that there was a violation of the Safety Appliance Act in that the tender leaked and the top thereof was covered with ice and was slippery."

The complaint in 4(d) first charges "that this tender was unsafe because the top where the plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life or limb and the tender leaked there."

In other words, the gist of the plaintiff's claim in Paragraph 4(d) is that there was ice on top of the tender which was slippery and while the plaintiff was performing his work in taking water he slipped on the ice on the top of the tender and was thus injured in the line of his duty. Whether he proved a leak or a mechanical defect in the top of the tender was unnecessary to establish the plaintiff's claim of a violation of the Safety Appliance Act.

It is necessary to briefly refer to the history of the Safety Appliance Act in order to perceive its scope and effect.

The first Safety Appliance Act was passed March 2, 1893, Chapter 196, 27 Stat. 531; amended March 2, 1903, Chap. [fol. 231] 976, 32 Stat. 943; and further amended May 3,

1908, Chap. 225, 35 Stat. 476, and again April 14, 1910, Chap. 160, 36 Stat. 298 (Compiled Statutes, Sec. 8605 *et seq.*). By these Acts of Congress it had required a power driving wheel brake, automatic couplers, grab irons or handholds, drawbars, safety ash pans and sill steps. In the first Safety Appliance Act of 1893, *supra*, Sec. 2 of that Act provided:

"And failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as the failure to comply with any requirement of this Section."

On February 17, 1911, Chap. 3, 36 Stat. At Large, Sec. 2, Congress for the first time extended the Safety Appliance Act by making it unlawful for any common carrier to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereto are in proper condition and safe to operate in the service to which the same are put that the same may be employed in active service of such carrier in moving traffic without unnecessary peril to life or limb.

This extension of the Safety Appliance Act is commonly known as the Boiler Inspection Act. On March 4, 1915, Chap. 169, 38 Stat. 1192, Congress further amended the Safety Appliance Act by extending the Boiler Inspection Act to apply to and include the entire locomotive and tender and all parts and appurtenances thereof, and Section 3 of the Amended Act of 1915 provided as follows:

"That nothing in this Act shall be held to alter, amend, change, repeal or modify any other Act of Congress than the said Act of February 17, 1911, to which reference is hereby specifically made, or any order of the Interstate Commerce Commission promulgated under the Safety Appliance Act of March 2, 1893, and supplemental Acts."

[fol. 232] On June 7, 1924, Chap. 355, 43 Stat. 659, Congress again amended the phraseology of the Boiler Inspection Act, as set forth in 45 U. S. C. A. Pg. 79, Section 23.

It will be observed from this history of the Safety Appliance Act that Section 2 of the original Act, *supra*, conferred the power upon the Interstate Commerce Commission which was amplified by Section 3 of the Act of 1915, *supra;* by Section 2 and the amended Section 3 the duties

and powers of the Interstate Commerce Commission became and is an integral part of the whole Safety Appliance Act legislation including the Boiler Inspection Act and its amended sections.

Under the power and authority granted to the Interstate Commerce Commission by these Acts the Commission promulgated under the authority of these Acts a series of rules for the inspection and testing of steam locomotives and their appurtenances and among the rules are the following:

"Tender

152. Tender frames. (a) Tender frames shall be maintained in a safe and suitable condition for service.

(b) The difference in height between the deck on the tender and the cab floor or deck on the locomotive shall not exceed 1½ inches.

(c) The minimum width of the gangway between locomotive and tender, while standing on straight track, shall be 16 inches.

153. Feed water tanks. (a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

(b) Not less frequently than once each month the interior of the tank shall be inspected, and cleaned if necessary.

[fol. 233] (c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. Suitable covers shall be provided for filling holes."

(See official pamphlet of Interstate Commerce Commission, Bureau of Locomotive Inspection, orders dated October 11, 1915, to February 21, 1929, inclusive.)

(See also Roberts Fed. Liab. of Car., Vol. II, Appendix V, Pgs. 2068 and 2069.)

The opinion of the Appellate Court in Paragraph 2 relates the facts as set forth in the record and amplified by Paragraph 12.

From these facts as related in the paragraphs of the opinion of the Appellate Court it is plain that the defendant violated Rule 153(c), *supra*, and by reason thereof plaintiff was entitled to have his judgment affirmed.

These rules of the Interstate Commerce Commission, *supra*, duly promulgated, are an integral part of the Safety Appliance Act and whether a locomotive, its parts and appurtenances are safe to operate is determined by the compliance of the railroad company with such rules. This question of the power of the Interstate Commerce Commission under the Boiler Inspection Act (which is a part of the Safety Appliance Act) first came before the Supreme Court of the United States in the case of *Napier* v. *Atlantic Coastline Railroad Co.*, 272 U. S. 605, 47 S. Ct. 207, and in this case Mr. Justice Brandeis, writing the opinion of the Court, said as follows:

"• • • The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in *Vandalia R. Co.* v. *Public Service Commission*, 242 U. S. 255, 37 S. Ct. 93, 61 L. Ed. 276. We think that power was conferred. The duty of the Commis- [fol. 234] sion is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since."

The language quoted from the *Napier* opinion, *supra*, was repeated in *B. & O.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, and again in *U. S.* v. *B. & O. R. Co.*, 293 U. S. 455, 55 S. Ct. 468. All three of these cases definitely decided, as quoted in the three cases, the following:

"Unless these rules and regulations are complied with the engine is not in the proper condition for operation."

From these authorities we urge that it is impossible to merely quote the main provisions of the Boiler Inspection Act, as was done by the Appellate Court in Paragraph 5 of the opinion and from that alone and from the wording of the amendment set forth in said paragraph to determine the full scope and effect of the Safety Appliance Act as it applies to the allegation of the plaintiff's complaint and

the evidence as set forth in the opinion of the Appellate Court.

If the rules are the test as set forth in the authorities above quoted by the Supreme Court of the United States as to the fitness of an engine for service the rules must be looked to in determining whether or not the defendant has complied with the Act, and when Rule 153(c), *supra*, is applied to the facts it is plain that in the cold weather the defendant had permitted water instead of being carried [fol. 235] away to freeze on top of the tender and cause the plaintiff to slip and be injured in the line of his duty. The prime purpose of Rule 153(c) was obviously designed to avoid the very danger which was proven to have injured the plaintiff in this case, and consequently entitled the plaintiff to have his judgment affirmed.

We respectfully submit that the judgment of reversal has resulted in a miscarriage of justice due to the failure of the Appellate Court to give a broad and sweeping interpretation of the Safety Appliance Act in accordance with the decisions of the Supreme Court of the United States in the *Napier*, *Groeger* and *U. S.* cases, cited *supra*. The historic development of the Safety Appliance Acts and their enforcement by the Interstate Commerce Commission if applied under the controlling decisions of the Supreme Court hereinbefore cited, would have compelled the Appellate Court to reach the opposite conclusion in this case.

This Court has determined that in passing upon the provisions of the Federal Act this Court is bound by controlling Federal decisions. See *Sycamore Preserve Works* v. *Chgo. N. W. Ry.*, 366 Ill. 11.

II

The Appellate Court erred in reversing this judgment by applying the common law doctrine of assumption of risk when such a defense was prohibited by the Federal Employers' Liability Act where there was a violation of the Safety Appliance Act.

The doctrine of assumption of risk had no place in this case as a defense for the reason that the Federal Employers' Liability Act specifically withdrew such a defense in [fol. 236] favor of a defendant where there was a violation of any Statute enacted for the safety of employees which contributed to the injury.

See 45 U. S. C. A., Sec. 54, which is as follows:

"*Assumption of risks of employment.*

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (As amended Aug. 11, 1939, c. 685, #1, 53 Stat. 1404.)"

In view of the foregoing provision of the Federal Safety Appliance Act the Appellate Court erred as shown in Paragraphs 12, 13, 14 and 15 of its opinion, in applying the common law doctrine of assumption of risk.

It therefore is apparent as to this point that the common law doctrine applied by the Appellate Court in its opinion and the cases of *Hatton* v. *N. Y. N. H. & H. R. R. Co.*, 261 Fed. 667, 669, *Seaboard Airline* v. *Horton*, 233 U. S. 492, 504, *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, and *Bolt* v. *Pennsylvania R. R. Co.*, 245 U. S. 441, 445, are not applicable to the cause at bar in view of the plain violation by the Defendant of the Safety Appliance Act.

[fol. 237] III

The Appellate Court erred in reversing the judgment for plaintiff in that the Court erroneously eliminated the Safety Appliance Act by reason of the answer of the jury to a special interrogatory submitted by the defendants.

Under Paragraph 4 of the opinion of the Appellate Court the Court stated that the allegation there was a violation of the Safety Appliance Act in that the tender leaked and was covered with ice and was slippery was the only question involved in the case aside from a general charge of negligence in permitting ice to form and remain on the top of the tender.

In other words, the Appellate Court concluded that when the jury, in answer to the special interrogatory, found that there was no leak in the top of the tender, that this eliminated the Safety Appliance Act. It is our contention that this was only a part of the allegation of the complaint 4(d), *supra*. If there had been a leak in the top of the tender this would be a mechanical defect in the tender itself which was violative of the general provisions of the Safety Appliance Act, Section 23, as quoted in the opinion of the Court at Paragraph 5, and such a leak in the tender would also be a violation of Rule 153(a) of the Interstate Commerce Commission, because the Commission had promulgated the rule specifically as to such a defect.

However, the general provisions of Section 23 must be read in connection with the entire allegation of the complaint 4(d) and Rule 153(c) of the Interstate Commerce Commission wherein the Commission had specifically promulgated this rule, which is as follows:

"Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water."

[fol. 238] When the specific rule, 153(c), is read in connection with the general provisions of Section 23, it will be observed that the allegation in 4(d) was squarely on this question of Rule 153(c), which was clearly violated by the defendant. Since the test of the safety of a locomotive engine, its tender and its appurtenances for service can only be tested by compliance with the rules of the Commission, which is the law enunciated by the Supreme Court in the *Napier*, *Groeger* and *U. S.* cases, *supra*, then the plaintiff, under the finding of facts by the Appellate Court in its opinion, has proven a violation of the Safety Appliance Act. It is, as we contend, absolutely imperative for the Appellate Court to have given full force and effect to Rule 153(c) in determining the fitness of the locomotive for service and under the undisputed facts Rule 153(c) was violated and the locomotive therefore was unsafe and unfit for service within the meaning of Section 23 of the general provisions of the Safety Appliance Act known as the Boiler Inspection Act.

A reading of Rule 153(c), together with a reading of the general provisions of Section 23 under the admitted facts conclusively shows that the defendant violated a specific

rule promulgated to make effective the general provisions of the Boiler Inspection Act without which the general provisions of the Act are only partially effective and probably limited to mechanical defects in some part of the locomotive, its tender or appurtenances.

It is obvious that Rule 153(c) was promulgated by the Interstate Commerce Commission due to the general knowledge that in cold weather if means are not provided to carry off the waste water and it is permitted to remain on the tender and freeze, it subjects the employee to the very danger which brought about the tragic accident to this [fol. 239] plaintiff. It is impossible to read the allegation of the complaint 4(d), under the admitted proof as shown by the opinion of the Appellate Court, without concluding that the tender was unsafe within the meaning of Rule 153(c) and therefore unfit for service within the meaning of the general provisions of Section 23. If the jury had found in answer to the special interrogatory that there was a leak in or near the manhole, as alleged, it would prove a violation of the general provisions of Section 23 and also Rule 153(a), but this answer of the jury to the interrogatory neither nullified nor answered that part of the uncontradicted evidence as shown by the Court's opinion wherein it was practically conceded that there was ice on top of the tender which caused the plaintiff to slip by reason thereof and suffer an injury while he was employed in the line of his duty. Hence, it was the erroneous elimination of the ice on the top of the tender which caused the Court to relegate the plaintiff's claim to purely common law negligence, which in reality has no place in this cause in view of the violation of Rule 153(c) when read, as we have heretofore said, in connection with the general provisions of Section 23 and, as we have heretofore said, it is necessary to interpret Rule 153(c) in connection with the general provisions of Section 23 in order to give full effect to the scope of the Safety Appliance Act under the *Napier*, *Groeger* and *U. S.* cases, *supra*.

[fol. 240] IV

The Appellate Court erred in reversing the judgment of the plaintiff solely on the motion of the defendant for a judgment notwithstanding the verdict in that the Court failed under such motion to view the plaintiff's testimony

in its most favorable light together with all of the reasonable inferences deducible therefrom.

We make the contention that the Court failed to view the plaintiff's testimony in its most favorable light due to the fact that the Court eliminated entirely the Federal Safety Appliance Act and proceeded to analyze the plaintiff's evidence solely under the common law doctrine of negligence. Under this doctrine the plaintiff was not only obligated to show that the ice was carelessly and negligently permitted to form on the top of the tender, but that some employee of the defendant either caused the ice to be there or that it was present such a length of time that the company would be chargeable with knowledge of it. As pointed out by the Appellate Court in its opinion no such proof was offered under the theory of common law negligence.

However, where there has been a violation of a Safety Appliance Statute the gist of the violation is not negligence, but a failure to comply with a mandatory, unqualified and continuing duty of the defendant under the Statute.

Beltz v. *Lehigh Valley R. Co.*, 10 F. (2d) 74, cert. den. 270 U. S. 641; 46 S. Ct. 205

Where the effect of the Appellate Court's holding is that the evidence is insufficient to sustain any charge of a count in the complaint, this Court must examine the record to [fol. 241] determine whether the evidence taken with its intendments most favorable to plaintiff tends to prove such count.

In *Sycamore Preserve Works* v. *C. & N. W. Ry. Co.*, 366 Ill. 11, the Court said as follows:

"But where the effect of the Appellate Court's holding is that there is not evidence sufficient, when considered alone, to sustain the charge of a count of the complaint or declaration, it becomes the duty of this court to examine the record to determine whether there is any evidence, which, taken with its intendments most favorable to the plaintiff, tends to prove the charge of the declaration. (*Miles* v. *Long*, 342 Ill. 589; *Hunter* v. *Troup*, 315 id. 293; *Leighton and Howard Steel Co.* v. *Snell*, 217 id. 152.)"

By reason of this rule in addition to the facts related by the opinion of the Appellate Court (Paragraph 2 and Paragraph 7) the abstract of record shows that the engine in question was coaled and watered before it was put into

service the morning of the accident some 40 or 50 minutes after the engine had left the roundhouse on the beginning of its trip (See Abst. 29, Rec. 102 and Abst. 134, Rec. 348).

Where only a motion *non obstante veredicto* was filed, as in this case, the plaintiff is entitled to have the evidence taken in the most favorable light, and when considered to be true together with inferences which might legitimately be drawn therefrom the jury might reasonably have found for the plaintiff. *Russell* v. *Richardson*, 302 Ill. App. 589, 24 N. E. (2d) 185, *Goodrich* v. *Sprague*, 376 Ill. 80, 32 N. E. (2d) 897. Under this rule and viewing the evidence in the light most favorable to the plaintiff under the allegation of his complaint 4(d), the evidence shows that the plaintiff got up on the top of the tender and [fol. 242] slipped on ice which was on the top thereof; that it had not rained that day or the day before and the weather was freezing (Abst. 27); that the tender of the engine had been in service from some 40 or 50 minutes after it was taken from the roundhouse and that before the engine was taken from the roundhouse it had been coaled and watered by the hostler (Abst. 29).

The foregoing view of the evidence considered in the light most favorable to the plaintiff shows a clear violation of Rule 153(c) and the Safety Appliance Act which entitled the plaintiff to the judgment rendered in the trial Court; and it was therefore erroneous for the Appellate Court to reverse the judgment on the motion of the defendant *non obstante veredicto* and that the judgment of the Appellate Court should be reversed and the judgment of the Superior Court of Cook County should be affirmed.

Prayer for Leave to Appeal

The petitioner, Norvel H. Lilly, respectfully prays of this Honorable Court that he be granted leave to appeal to this Court from the judgment of the Appellate Court of Illinois, First District, Second Division, and that this Court order the said Appellate Court to certify the Record in Case Number 40882 to this Court for its review, and that upon review thereof by this Court the judgment of the Appellate Court may be reversed, vacated, set aside and held for naught, and that the judgment of the Superior Court of Cook County may be sustained.

[fol. 243] STATEMENT OF THE DATE ON WHICH JUDGMENT OF THE APPELLATE COURT BECAME FINAL

The judgment of the Appellate Court became final on the 10th day of December, 1941, said date being the date on which the Appellate Court denied the petition of your petitioner for a rehearing.

Respectfully submitted, Edward B. Henslee, Samuel Cohen, Attorneys for Petitioner. Paul R. Brown, of Counsel.

[fol. 244] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday the ninth day of March in the year of our Lord one thousand nine hundred and forty-two, within and for the State of Illinois.

Present: Loren E. Murphy, Chief Justice; Justice Clyde E. Stone, Justice Elwyn R. Shaw, Justice Walter T. Gunn, Justice Paul Farthing, Justice Francis S. Wilson, Justice June C. Smith.

George F. Barrett, Attorney General. Warren C. Murray, Marshal.

Attest: Edward F. Cullinane Clerk Pro tempore.

Be *Te* Remembered, that to-wit: on the 12th day of March 1942, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of record, to-wit:

No. 26610

NORVEL H. LILLY, Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Respondent

Petition for Leave to Appeal from Appellate Court, First District

39 S, 1005-40882

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record

and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois and keeper of record, files and seal thereof, do hereby certified that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Supreme Court in Springfield, in said State this 20th day of March A. D. 1942.

Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 245] And afterwards on the 24th day of March A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 246] 40882

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Superior

The Court having considered the motion of Appellee that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of the United States for a Writ of Certiorari to review the judgment of this Court in said cause shall have expired without any such petition having been filed, and if such petition for said Writ of Certiorari shall have been filed within the proper time; then until said Writ of Certiorari shall have been granted or refused; and the Court being fully advised in the premises doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the same day to-wit; the 24th day of March A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 247] 40882

NORVEL H. LILLY, Appellee,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Superior

The Court having considered the motion of Norvel H. Lilly, Appellee in this cause and Plaintiff in the Superior Court of Cook County, for the issuance of the Certificate of this Court that there is fairly involved in the claim of the said Norvel H. Lilly, Appellee in said cause more than Fifteen Hundred Dollars ($1500.00), as per suggestions and affidavit filed herein. And the Court being fully advised in the premises, are of the opinion and Therefore Certify that more than Fifteen Hundred Dollars ($1500.00), is fairly involved in the claim of Norvel H. Lilly, Appellee herein and Plaintiff in the Superior Court of Cook County.

John J. Sullivan, Hugo M. Friend, Justices of the Second Division, Appellate Court, First District, Illinois.

[fol. 248] I, Sheldon W. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and Keeper of the records, files and seal thereof, Do Hereby Certify that the foregoing pages numbered 1 to 172 inclusive, are a true copy of the Abstract of Record filed by the Appellant in the case of Norvel H. Lilly, Appellee, vs. Grand Trunk Western Railroad Company, a Corporation, Appellant in said Appellate Court on September 12, A. D. 1939.

I further certify that the foregoing numbered pages 173 to 201 inclusive are a true, full and complete Transcript of the Record of Proceedings of said Appellate Court in the case of Norvel H. Lilly, Appellee vs. Grand Trunk Western Railroad Company, a Corporation, Appellant, of record in my office, and also of the opinion of said Appellate

Court rendered herein and filed in said cause of the 28th day of November A. D. 1941, and also a certified copy of the order of the Supreme Court of Illinois denying the Petition for Leave to Appeal in said cause which was filed in said Appellate Court on the 23" day of March A. D. 1942, in said cause, as all of the same now appear on file in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, this 27' day of March in the year of our Lord One Thousand Nine Hundred and Forty-two.

Sheldon W. Govier, Clerk of the Appellate Court, First District, Illinois. (Seal.)

[fol. 249] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, First District, is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 46,618. Illinois, Appellate Court, First District. Term No. 124. Norvel H. Lilly, Petitioner, vs. Grand Trunk Western Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed June 6, 1942. Term No. 124 O. T. 1942.

(2878)

FILE COPY

FILED
JUN 6
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. ~~1290~~ 124

NORVEL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. .....

NORVEL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The petition of Norvel H. Lilly respectfully shows to this Honorable Court:

I.

Summary Statement of Matter Involved.

This action under the Federal Employers' Liability Act and the Safety Appliance Act arose out of an accident wherein petitioner, a brakeman, sustained personal injuries when he fell from the tender of a locomotive as he

was pulling a water spout over the manhole by means of a long pole, preparatory to filling the tank with water. The accident occurred on February 6th, 1937, at Ferndale, Michigan. The parties were engaged in interstate commerce.

A general verdict of $32,500.00 was returned by the jury and sustained by the trial court (R. 10-11, 171)[1], but upon appeal by respondent, the Appellate Court of Illinois, First District, ordered and directed judgment in favor of respondent, notwithstanding the verdict, and this judgment was, in effect, affirmed by the Supreme Court of Illinois by denying petitioner's request for leave to appeal (R. 226), making the judgment of the Appellate Court of Illinois final.

The Illinois courts refused to apply the provisions of the Safety Appliance Act that it shall be unlawful to use any tender unless all its parts are in proper condition and safe to operate without unnecessary peril (45 USCA 23) and further refused to apply Rule 153 of the Interstate Commerce Commission that the top of the tender behind the fuel space should be kept clean and means provided to carry off waste water.

It appeared without dispute that petitioner was caused to fall to the ground when the pole and its hook slipped on the water spout and his feet simultaneously slipped on ice on the top of the tender.

Opinion of the Court Below.

The opinion in the Appellate Court of Illinois, First District, is reported in *Lilly* v. *Grand Trunk Western Railway Company*, 312 Ill. App. 73, 37 N. E. (2) 888. Copy of the opinion, Rec. 226 *et seq.*

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[1]R. refers to Transcript of Record.

The Pleadings.

Insofar as presently material, the complaint charged general negligence with respect to the presence of the ice on the tender (R. 4, 5) and, further, alleged a violation of the Safety Appliance Act in two separate and specific respects:

D. that by reason of ice and other slippery materials the tender was in an improper condition and was unsafe to operate in the service without unnecessary peril to life and limb (R. 5);

E. that by reason of a crack or hole which permitted leakage, the tender was in an improper condition and was unsafe to operate in the service without unnecessary peril to life and limb (R. 8, 9).

Respondent denied all the above charges and pleaded assumption of risk and contributory negligence as complete defenses. At its request, a special interrogatory was submitted to the jury (R. 169) and answered in the negative (R. 10), inquiring as to whether there was any leak near the manhole collar. The Appellate Court accorded a finality to the jury's answer which it was unwilling to give the verdict on the other fact issues in the case. For present purposes only, we will assume, without conceding, that the answer to the interrogatory eliminates from the case any claim of defect in the tender itself, leaving such questions only as arose from the presence of the ice upon the tender from negligent causes, as a violation of the Safety Appliance Act.

All the ice was behind the fuel space and within the prohibitions of Rule 153 (R. 79—Photos. 109-115).

The special interrogatory related solely to charge "E" above, and the Appellate Court of Illinois ignored and refused to apply the Federal Safety Appliance Act to charge

"D" above. Therefore, the answer to this interrogatory in no wise removed the charge that the Safety Appliance Act had been violated because the tender was unsafe due to ice resulting from the negligence of another servant.

Statement of Case.

Petitioner climbed up the regular ladder at the rear of the tender. There was no ice on the rear of the tender and he did not notice or observe any ice when he immediately climbed on top. The ice was in front of the manhole, toward the engine, and it was not until he got around in front of the manhole, which is about 10 or 12 inches high and about 3 feet long (R. 27, 28), that he noticed the ice (R. 78). It covered an area about six feet square (R. 79). Some of respondent's witnesses characterized it as a little or very little ice (R. 102, 127).

The water spout is pulled over the manhole of the tender by means of a long pole with a hook attached thereto. It was petitioner's duty to fill the tender with water. He found the hook embedded in the ice, where it had frozen, and he had to kick it out and knock the ice off. He then braced himself with his feet astride, reached over for the water spout and started to pull it into position, when the hook slipped on the water spout and his feet slipped on the ice, causing him to lose his balance and fall to the ground (R. 18, 78).

The ice was not deposited on the tender by natural causes (R. 27-28, 32, 100). There had been neither rain nor snow (*Id.*). It was admitted on page 17 of respondent's brief in the Appellate Court that the water spattered onto the deck when employes filled the tank (Appendix p. 34)[1]. Under the rules and practice, while the tank should be loaded full, the water should not be permitted to overflow

[1]Appendix in rear pages of this document.

(R. 34-35, 101, 118, 125-130). There is a controlling device to gauge the flow and to prevent any overflow (R. 35, 130-131), and water will not spill or slop over unless the employe filling the tank is negligent (R. 35, 101, 118, 125, 130-131).

It is the duty of the hostler to fill the tenders with coal and water before they leave the roundhouse (R. 29, 139). This engine left Detroit about 7:00 or 7:15 the morning of the day of the accident (R. 17). The petitioner had not been on the tender since the day before (R. 27).

The time of the accident did not appear, but inasmuch as it took about 40 or 50 minutes to go from the roundhouse to Ferndale (R. 29), where they did some switching (R. 17), it is fair to state that the accident occurred about an hour after the crew left Detroit. No water was put in the tank after leaving the roundhouse (R. 29). It was freezing weather (R. 27, 32).

The fireman who finished the job of filling the tank with water after the accident said it was down about 18 or 20 inches (R. 122). It appears that coal and coal dust will sometimes clog up the water drains on a tender (R. 79).

Jurisdiction of the Court.

The complaint alleged that the presence of ice constituted a violation of the Safety Appliance Act (R. 5) and the trial court submitted the question of safety appliance violation generally to the jury (R. 175-176), which found for petitioner.

The train involved carried interstate commerce (R. 14) and both the trial and appellate courts found that the rights and liabilities of the parties were to be determined by the Federal Statutes. The judgment of the Appellate Court of

Illinois sought to be reviewed was entered November 28, 1941 (R. 202). The Petition for Leave to Appeal to the Supreme Court of Illinois was denied by that court on March 13, 1942 (R. 213), making the judgment of the Appellate Court final. The action arises under the Federal Employers' Liability Act and the Federal Safety Appliance Act, and the jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13th, 1925. Cases believed to sustain jurisdiction are *Chesapeake & O. R. Co.* v. *Mihas*, 280 U. S. 102, and *Chicago G. W. R. Co.* v. *Rambo*, 298 U. S. 99.

The Questions Presented.

The trial court submitted the questions of negligence, contributory negligence, assumption of risk and safety appliance violation to the jury, reading the applicable statutes[1], and the case was submitted in a charge that was fair and impartial and which admittedly expressed correct principles of law (R. 175 to 189). Sustaining the verdict for plaintiff, the trial court held that the answer to the special interrogatory did not negative a violation of the Safety Appliance Act (R. 171) because of the two specific and independent grounds alleged in the complaint (R. 5, 8-9).

The principal questions presented to the Appellate Court and the Supreme Court of Illinois were:

1. whether the evidence was sufficient to prove a violation of the Safety Appliance Act under charge "d" in plaintiff's complaint, which question was wholly ignored by the Courts below;

---

[1]The text of the Federal Employers' Liability Act, the Federal Safety Appliance Act, so far as here material, and the pertinent rules of the Interstate Commerce Commission will be found set forth *in extenso* in the appendix, pp. 31 to 33.

2. whether the answer to the special interrogatory was conclusive against a finding that the Safety Appliance Act had been violated;

3. whether the evidence was sufficient to permit a finding of general negligence;

4. whether the amendment to the Federal Employers' Liability Act of August 11th, 1939, abolishing the defense of assumed risk was retroactive, and, if not,

5. whether the evidence justified or required a decision as a matter of law that the petitioner assumed the risk.

All of these questions were decided by the appellate courts of Illinois adversely to the petitioner.

II.

Reasons Relied On for Allowance of Writ.

The appellate courts of Illinois erroneously failed to apply the Federal Safety Appliance Act, and have decided Federal questions of substance in conflict with the decisions of this Court and the Circuit Courts of Appeal, to-wit:

A. In adopting a strict, narrow, erroneous and technical construction of the Safety Appliance Act, contrary to the liberal and humanitarian policy announced by this Court in *St. Louis I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281; *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617; *Swinson* v. *Chicago, St. P. M. & O. Ry. Co.*, 294 U. S. 529; *Brady* v. *Terminal R. Co.*, 303 U. S. 10.

B. In failing to take judicial notice of Rule 153(a) and (c) of the Interstate Commerce Commission, contrary to *United States* v. *B. & O. Ry. Co.*, 293 U. S.

454; *Caha* v. *U. S.*, 152 U. S. 211; *Jenkins* v. *Collard*, 145 U. S. 546; *Knight* v. *United Land Ass'n.*, 142 U. S. 161; *Thompson* v. *Missouri Pacific R. Co.*, 15 F. (2d) 28.

C. In holding that the defense of assumed risk is a vested right and that, therefore, the amendment to the Federal Employers' Liability Act of August 11th, 1939, was not retroactive, contrary to *Arizona Copper Co.* v. *Hammer*, 250 U. S. 400; *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538; *South Carolina* v. *Gaillard*, 101 U. S. 433; *U. S.* v. *Schooner Peggy*, 1 Cranch 103.

D. In erroneously converting the partial defense of contributory negligence into the complete defense of assumption of risk, contrary to the explicit ruling of this Court in *Schlemmer* v. *Buffalo P. & P. R. Co.*, 205 U. S. 1; *Seaboard Airline Ry. Co.* v. *Horton*, 233 U. S. 492.

E. In disregarding and violating the principle that petitioner was entitled to have the evidence considered and reasonable inferences drawn in support of the verdict and judgment rendered, contrary to *Jacob* v. *City of New York*, 62 S. Ct. 854; *Gunning* v. *Cooley*, 281 U. S. 90; *Elzig* v. *Gudwangen*, 91 F. (2d) 434; *Chicago M. St. P. & P. R. Co.* v. *Linehan*, 66 F. (2) 373; *Kulp* v. *Chicago, St. P., M. & O. Ry. Co.*, 88 F. (2d) 466.

F. In holding as a matter of law that petitioner assumed the risk, contrary to the uniform current of authority in both State and Federal courts, commiting such an issue to the jury where a servant slips on ice, water, oil or other slippery substance, con-

trary to *Bell* v. *Terminal R. Co.*, (Mo.) 18 S. W. (2d) 40; *Missouri Pacific R. Co.* v. *Boyd*, 106 S. W. (2d) 165; *York* v. *C. M. & St. P. R. Co.* (Wis.), 198 N. W. 377; *Melody* v. *Des Moines Union R. Co.*, (Ia.) 141 N. W. 438; *Reams* v. *C. M. & St. P. R. Co.* (Minn.), 231 N. W. 236; *Illinois Central R. Co.* v. *Skinner's Admr.*, (Ky.) 197 S. W. 552; *Missouri Pac. R. Co.* v. *Siratt*, 78 F. (2d) 253; *Northern Pac. Ry.* v. *Berven*, 73 F. (2d) 687; *C. N. O. & T. P. Ry. Co.* v. *Thompson*, 236 F. 1.

It is essential that a Writ be granted in order to determine an important question relating to the construction and interpretation of the Safety Appliance Act and, specifically, whether the doctrine of the case of *Ford* v. *N. Y. & H. R. Co.*, 54 F. (2d) 342, cert. den. 285 U. S. 549, is applicable to a case coming under Rule 153(a) and (c) of the Interstate Commerce Commission. It is the contention of petitioner that where the Interstate Commerce Commission has set up the standard, as in Rule 153(a), the doctrine of the *Ford* case has no application. The Interstate Commerce Commission set up no such standard or requirement as to grab irons and handholds.

PRAYER.

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Appellate Court of Illinois, First District, commanding said court to certify and send to this Court a transcript of the record in the case entitled "Norvel H. Lilly, appellee, *v.* Grand Trunk Western Railway Company, a corporation, appellant, number 40882", including also the proceedings in said Appellate Court, together with the Illinois Supreme Court's denial of petitioner's request for

leave to appeal, to the end that said cause may be reviewed and determined by this Court and the judgment of the lower courts be reversed.

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Petitioner,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

The facts with reference to the origin and history of the case and also with reference to jurisdiction have been sufficiently covered in the petition, and in the interests of brevity will not be here repeated. The issues and the evidence have likewise been discussed in the preceding petition so that the detailed picture need not be repeated. It might be well, however, to review in a little more detail the evidence concerning the proper, customary and careful manner of filling the tank of a tender in order to avoid overflow.

Petitioner testified that it was easy to keep the water from slopping and he had never seen employes let it do so (R. 35). Respondent's evidence was to the same effect: Findley (R. 131) testified that he could regulate the flow so as to get just enough water without overflowing if he handled it right and he usually did; Granger (R. 101) that the rule is that tanks are to be filled so they do not overflow; Holton (R. 118) that there is a regulator so that a fellow can gauge the stream just the way he wants it; and Smith (R. 125) that it is the rule not to let the water go over the top and one could prevent it by handling it right.

In view of the jury's finding that there was no crack or leak in the tender, it is certain that they also found under the general verdict for petitioner that the water accumulated and froze because of a violation of the rule and customary practice referred to above. These two findings are not at all inconsistent. Accepting the answer to the special

interrogatory as final under the decision of the Appellate Court, there is, indeed, no other rational conclusion possible under the evidence.

Specification of Errors to Be Urged.

The Supreme and Appellate Courts of Illinois erred:

1. In holding as a matter of law that there was no violation of the Safety Appliance Act.
2. In holding that the defense of assumed risk was available to respondent.
3. In holding that the evidence was insufficient to warrant a finding that respondent was negligent.
4. In holding that it conclusively appeared as a matter of law that petitioner assumed the risk.

ARGUMENT.

I.

The evidence showed a violation of the Federal Safety Appliance Act.

The Act (45 USCA 23) requires the tender and all its parts and appurtenances to be in proper condition and safe to operate in active service without unnecessary peril to life or limb. The duty is absolute and mandatory and makes the railroad company practically an insurer. As said by Mr. Justice Hughes in *Brady* v. *Terminal R. Assn. of St. Louis*, 303 U. S. 10:

> "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous."

See also to the same effect *Southern R. Co.* v. *Lunsford*, 297 U. S. 398; *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521; *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454; *Lehigh Valley R. Co.* v. *Beltz*, 10 F. (2d) 74, cert. den. 270 U. S. 641.

Under the authority conferred by this Federal Statute, the Interstate Commerce Commission issued Rule 153 which provides:

"TENDERS

"Rule 153. (a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. * * *

"(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. * * *."

See Roberts' Federal Liabilities of Carriers, Vol. 2, 2d Ed., Appendix V, pages 2068 and 2069.

This rule was in effect at the time of the accident and under the decisions of this Court it was as controlling as the Act itself, because, as said by Justice Brandeis in *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454:

> "When the rules have not been complied with which were issued by the Commission the engine is unsafe within the meaning of the Boiler Inspection Act."

The rule is well stated in *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521:

> "The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard."

The issue as to whether ice alone constituted a violation of the Act was raised by the pleadings and submitted to the jury (R. 5, 175-176), and in sustaining the verdict under the Act, despite the answer to the special interrogatory, the trial court stated:

> "Now, whether there was a crack or not, yet still the question of the safety appliance could remain in there if the court did feel that it was the duty of the defendant to keep the tender clear so that the man might operate. I don't know about that. It might be" (R. 171).

Both the jury and the lower court upon ample evidence found that the ice was present and due to defendant's negligence, and, therefore, all the facts upon which decision must depend are in the present record.

This particular issue—the charge of violation of the Safety Appliance Act—was presented to the Appellate Court in petitioner's brief and argument originally filed in the Appellate Court, by the following language:

> "Plaintiff made out a case of clear liability—a violation of the Safe Locomotive Act, one of the Federal Safety Appliance Acts. * * * Plaintiff, in his complaint, makes two charges of a violation of this Act. In one charge 'd', the allegation is: '* * * this tender was unsafe because the top where plaintiff was required to work was slippery and covered with ice and other slippery materials * * * and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition * * *'". (Appendix p. 34.)

Both the jury and the lower court upon ample evidence found that the ice was present and, therefore, all the facts upon which decision must depend are in the present record. The issue was precisely the same, as far as the evidence and the facts are concerned, whether attention be directed to the issue of negligence generally or under this feature of the Safety Appliance Act. The fact that this controlling rule of the Interstate Commerce Commission was not urged upon the Appellate Court of Illinois until the petition for rehearing is of no significance.

It was therein fully discussed (R. 203 to 209) and was likewise called to the attention of the Supreme Court of Illinois in the Petition for Leave to Appeal (R. 214 to 225). It was the duty of the courts to take judicial notice of this applicable and governing rule of law. The decisions of this Court definitely establishing that duty will be found in Roberts' Federal Liabilities of Carriers, Vol. 2, Sec. 1020, in support of the statement that the courts will take judicial notice of the rules and orders of the Interstate Commerce Com-

mission pursuant to the authority delegated to it in the Safety Appliance Acts. In addition to the cases cited by Roberts, see *Thompson* v. *Mo. Pac. R. Co.*, 15 F. (2d) 28, and also *Goulette's Admr.* v. *Grand Trunk R.*, 93 Vt. 266—107 Atl. 188, where it is held:

> "In actions under the Federal Employers' Liability Act the Courts will take judicial notice of the standards established by orders of the Interstate Commerce Commission pursuant to authority granted by the Safety Appliance Act."

The neglect of the Appellate Court to apply or to take judicial notice of this rule involves no change of theory. The situation is similar to that existing where both counsel and the lower court merely overlook a controlling authority. There is no change to a different or inconsistent theory of a cause of action or defense. It is merely hornbook law that if between two appeals in the lower Federal Courts, this Court decides the question, its decision must be followed; and we are only seeking here a decision in accord with the controlling principles of law heretofore announced by this Court. This case has been tried and presented throughout on the theory that the Safety Appliance Act was violated in not merely the one respect foreclosed by the answer to the special interrogatory, but by the mere presence of the ice itself.

The mere statement of counsel in his closing argument to the jury that a negative answer would put his client out of court is a mere expression of opinion. It binds neither court nor client. It is absurd to suppose that a lawyer could thus change the governing and applicable rules of law. The statement was made in a context which indicates that it could not and should not be accepted with the literal interpretation placed upon it by respondent.

Even had counsel failed to urge the liability of the railroad company under the Safety Appliance Act, yet if the proof shows a violation, it is the duty of the court to take cognizance of it and to enforce the law as held in *Thompson* v. *Hocking Valley R. Co.* (6 Cir.) 45 F. (2d) 155. The court there said that if the appliance was really unsafe and the plaintiff was entitled to recover under the Act, "the shortcomings of counsel ought not to be given fatal effect."

It seems hardly necessary to add that the purpose of the original Act, as well as Rule 153, was to insure the removal of any foreign or extraneous material that might endanger the safety of employes. The words safe and proper are of plain and simple meaning. Rule 153 specifically provides for the removal of waste water. The word "clean" obviously has connotations of safety rather than of purity.

Where there is a violation of the Act, neither contributory negligence (45 USCA 53) nor assumption of risk (45 USCA 54) constitutes a defense, either total or partial.

It was held in *Ford* v. *New York, N. H. & H. R. Co.*, 54 F. (2d) 342, cert. den. 285 U. S. 549, that grease upon a handhold did not constitute a violation of the Safety Appliance Act. In that case the rule of the Interstate Commerce Commission prescribed only the size, dimensions and mechanical construction of the handhold. It did not require that it should be kept clean or free from grease. Here the rule requires that the tender be kept clean and free from waste water. Therefore, the very element which was absent in the *Ford* case is present here and a writ should be issued so that the law may be clarified and so that the *Ford* case and other similar decisions should be properly distinguished and limited.

II.

The amendment abolishing assumption of risk was retroactive.

Reference was recently made in the *Miles* case by Mr. Justice Jackson to the "medieval system" of compensating railroad employes, and one of the relics of this feudal and "backward" system was the ancient and barbarous doctrine of assumption of risk, now happily abolished in all cases. Presumably, when Congress acted to eliminate this defense, it did so with the purpose of promoting justice in all cases to which its power would extend. The cruelty of the defense had been the subject of much comment by judges, sociologists and law writers generally. The action of Congress was remedial; the legislation cannot be otherwise classified; and no good reason appears why the benefit of a wise and humane amendment should be unnecessarily restricted, but on the contrary, it should receive a liberal interpretation to effectuate its object and purpose.

The amendment passed by Congress on August 4th, 1939, and approved by the President August 11th, 1939, amended Section 4 of the Federal Employers' Liability Act, so that it now reads as follows:

> "Section 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where *such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employes of such carrier; and no employe shall be held to have assumed the risks of his employment in any case where* the violation by

> such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe." (The amended part is in italics.)

This amendment became effective while this case was pending on appeal in the Appellate Court (R. 13). The section refers not to accidents or causes of action, but to actions "brought" against common carriers. The language is, "That in any action brought * * *." Brought is in the past tense, and Congress did not limit the section to actions "to be brought", or "to be commenced", nor to "actions arising hereafter", etc.

That retrospective operation was intended by Congress is evidenced by the fact that Section 3 of the Federal Employers' Liability Act relating to contributory negligence provides, "In all actions hereafter brought * * *".

In *Hine* v. *Belden*, 29 Conn. 384, it was held that the use of "brought", "implies past time, and includes prosecutions pending, as well as those thereafter to be brought."

The statute is a remedial one, and under familiar principles of liberal construction should be given retrospective operation. Lewis Sutherland, Statutory Construction, Volume 2, page 1209, where it is said; referring to such statutes, "They will be freely construed to have a retrospective operation whenever such seems to have been the intention of the legislature". See, also, Cooley, Principles of Constitutional Law, 3d Ed., pages 360-361, where the author states:

> "The citizen has no vested right to any particular remedy, and the state may therefore take away at discretion those it provides and substitute others which shall apply to wrongs already committed as well as those which may be thereafter committed."

This Court said in *Arizona Copper Co.* v. *Hammer*, 250 U. S. 400:

> "No person has a vested right, entitling him to have unchanged the existing rules of law concerning an employer's responsibility for personal injury or death of an employe."

United States v. *Schooner Peggy*, 1 Cranch 103.
South Carolina v. *Gaillard*, 101 U. S. 433.
Ewell v. *Daggs*, 108 U. S. 143.
Railroad v. *Grant*, 98 U. S. 398.
Campbell v. *Holt*, 115 U. S. 620.
Arizona Copper Co. v. *Hammer*, 250 U. S. 400.
Carpenter v. *Wabash R. Co.*, 309 U. S. 23.
Vandenbark v. *Owens-Illinois Glass Co.*, 311 U. S. 538.

In the opinion of Justice Reed in the *Vandenbark* case, *supra*, the language of Chief Justice Marshall was quoted with approval that:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

The State authorities holding that remedial legislation of this kind should be given a retrospective operation are too numerous to cite in this brief.

It appears, therefore, that the opinion below is erroneous in stating that the defense of assumed risk is a vested right (R. 202) and was rendered by the court under a misapprehension as to the true rule established by the decisions of this Court.

III.

The evidence was ample to warrant a finding that respondent was negligent.

The courts below held that there was no evidence of negligence because, first, the origin of the water and ice did not appear, and, secondly, respondent had no notice of its existence.

In truth and in fact, it was established to the point of demonstration that the water and ice accumulated because the employe who previously filled the tank had negligently permitted an overflow (R. 27-28, 34-35, 100-101, 118, 125, 130-131). It is absurd to suppose that some trespasser, unobserved by the crew, stole his way to the top of the tender and thence to the area between the manhole cover and the fuel space and spread a pail of water over a six foot area at some unknown time between the departure from the roundhouse at Detroit and the arrival in the yards or during the switching operations in the yards at Ferndale. Nor is such speculation to find a defense permissible.

As said in *Kulp* v. *Chicago, St. P., M. & O. Ry. Co.*, 88 F. (2d) 466, cert. den. 201 U. S. 700:

> "In the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of."

More precisely in point is *Terminal R. Ass'n. of St. Louis* v. *Farris*, 69 F. (2d) 779, 785:

> "The fact that hypotheses incompatible with the liability of the appellant may be conjectured or imag-

ined, when such are not based on any testimony in the case, affords no reason to reverse a verdict and judgment which is supported by the testimony."

While the Appellate Court indicated in its opinion that the source or the origin of the ice was unknown, it was no mystery to the respondent when it prepared its brief in such Court, because on page 17 it was there stated:

> "If there was any ice on the deck of the tender it resulted from water unavoidably spattering onto the deck of the tender from the force of the water as the water is put in the tender by the crew." (Appendix p. 34.)

The notion that respondent did not have notice of the presence of the ice is equally a perversion of legal principles. As said in *Sears, Roebuck & Co.* v. *Peterson*, 76 F. (2d) 243, it is universally held that where the condition of the premises is "due to the direct act of the defendant, or of persons whose acts are constructively his own, no notice need be shown, but is necessarily implied". In the opinion a number of authorities are cited. We refer only to *Grzboski* v. *Bernheimer-Leader Stores*, 156 Md. 146, 143 At. 706, where a customer slipped on an orange peel in the aisle, and it was said:

> "It would still be possible, and consistent with such finding, that the orange peel might have been dropped on the pile by a customer subsequently, without the knowledge of the employe who swept it up, but it seems to this court that the probability would be that any such thing on or in a small gathering of rubbish at that one spot would itself have been gathered or swept there, a probability so strong that practical men would regularly take it as establishing the fact. And such a probability would be proper basis for a finding of fact."

The Circuit Court of Appeals in the *Peterson* case, *supra*, said that under such circumstances, "neither should the court indulge in mere speculation as to a possible defense unsupported by any proven facts."

It is only where the facts are such that all reasonable men must draw the same conclusion that the question of negligence becomes one of law for the court, and where fair minded men would honestly draw different conclusions, the question is one of fact to be settled by the jury. *Gunning* v. *Cooley*, 281 U. S. 90. As said in *Railroad Co.* v. *Stout*, 17 Wallace 657, 663, "It is this class of cases and those akin to it that the law commits to the decision of a jury."

IV.

Contributory negligence and assumption of risk were properly submitted to the jury.

The petitioner, although aware of the ice, braced himself with his feet astride (R. 18, 78). While there is always danger of slipping on ice, yet it is not absolutely certain that one will do so; it can be avoided by the exercise of that degree of care commensurate with the risk. The failure to exercise such care is contributory negligence and not assumption of risk.

Here it was not solely the fact that petitioner slipped upon the ice that caused the accident; there was also the element that the pole and hook slipped on the water spout; both were causative factors (R. 18, 78). There is no evidence that the hook was certain to slip or even likely to slip. There was no evidence that petitioner knew that the hook would slip. There was no evidence that he did not justifiably believe that the hook would remain upon the water spout and that with his feet properly braced he could succeed safely in filling the tender with water.

Assumption of risk is not a favored doctrine but is artificial and harsh; it is an affirmative defense and the burden to establish it is upon the master.

Kanawaha & M. R. Co. v. *Kerse*, 239 U. S. 576.
Texas & Pac. R. Co. v. *Archibald*, 170 U. S. 665.
C., R. I. & P. Ry. Co. v. *Ward*, 252 U. S. 18.
Chesapeake & O. R. Co. v. *Proffit*, 241 U. S. 462.
Schlemmer v. *Buffalo P. & P. R. Co.*, 205 U. S. 1.

There are two kinds of risks: 1, Ordinary risks, and, 2, extraordinary risks arising from negligence. Those in the latter classification are usually not assumed, and the courts are reluctant to sustain this defense when risks in the second category, due to negligence, are involved. Of particular interest here is the *Schlemmer* case, *supra*, where Justice Holmes indicated that the distinction between contributory negligence and assumption of risk should be carefully observed. He called attention to the fact that men who work with their hands do not have the freedom and equality of position assumed by *laissez faire*, that the doctrine of contract was rather shadowy as applied to this defense, and that distinguishing it from contributory negligence

> "* * * the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

Under the Federal Employers' Liability Act prior to the 1939 amendment contributory negligence merely diminished damages but assumption of risk was a complete defense. Section 3 (45 USCA 53) provides that, "Contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

In *Cross* v. *C. B. & Q. R. Co.*, 191 Mo. App. 202, 186 S. W. 1130, following the *Horton* and the *Schlemmer* cases, the Missouri court said great care should be exercised "lest the plaintiff's rights be sacrificed entirely by calling his act assumption of risk, when, strictly speaking, it is only contributory negligence, which does not defeat his cause of action entirely but merely reduces his damages."

It is impossible to reconcile the decision below with that of this Court in *Keys* v. *Pennsylvania R. Co.*, 308 U. S. 529, reversing the case of *Keys* v. *Pennsylvania R. Co.*, 104 F. (2d) 663, and holding that assumption of risk was for the jury. We earnestly request the members of this Court to read the opinion which was set aside and disapproved by the reversal in the *Keys* case. It would be a strange system of jurisprudence which would award a jury trial in that case and deny one here.

It is one thing to hold that where there is no negligence at all and where the ice was formed from natural causes, as in *Mo. Pac. R. Co.* v. *Aeby*, 275 U. S. 426, and *Hatton* v. *New York, N. H. & H. R. Co.*, 261 F. 667, there can be no recovery. In the *Aeby* case this Court said that anent negligence, "we need not consider its contentions in respect of assumption of risk * * * ". Holding as here that petitioner assumed the risk from ice negligently created by affirmative conduct is something else.

The other cases cited in the opinion below, namely, the *Horton*, *Jacobs* and *Boldt* cases, all concerned the propriety

of requested instructions, and in none of them was it held that assumption of risk appeared as a matter of law. In two of them the verdict of the jury was actually sustained and in the other case a reversal resulted from erroneous instructions. None is authority here.

The cases relied on by respondent and cited by the court fall in one of three classes:

1. Where no negligence was shown.
2. Where the condition was of a permanent nature and resulted from natural causes.
3. Where the danger of injury was certain and immediate and practically unavoidable.

The lower court gratuitously assumed that petitioner could have made the tender safe with sand or ashes. Apparently it did not know that all of the sanders operate simultaneously, that while sand is flowing from one sander onto a shovel, it would be flowing from the others on the rails, and that this sand is specially prepared and specially dried and is of a character so that engineers are reluctant to permit its use for other purposes. Apparently the court did not know that whether ashes are available depends upon the condition of the fire, and that it is a difficult task to obtain ashes with the fireman's shovel. In fact it is a dangerous proceeding to carry ashes mixed with hot coals to the top of the tender by either climbing up the ladder or climbing over the coal and it is an operation that requires the cooperation of two or more crew members.

We shall make no attempt to overwhelm this Court with the citation of the very plethora of State and Federal authorities holding that this issue in the case at bar was properly for the jury. As illustrative we select at random

Bell v. *Terminal R. Co.* (Mo.) 18 S. W. (2d) 40, where a fireman slipped on the icy steps of his engine. He and his engineer had been using them for hours and in answer to the contention that a verdict should have been directed, it was said, "We don't think so, for the evidence tends to show that immediate injury was not threatened by using the icy steps."

The respondent does not claim that petitioner should have selected any such course. It is obvious that the members of the Appellate Court themselves were utterly unfamiliar with either procedure, and had any of them ever attempted to obtain ashes from the firebox of a locomotive, the juridical result below might have been different. At any rate, the failure of petitioner to select the safer of two courses would be contributory negligence and not assumption of risk. This is thoroughly established.

STATE CASES.

Virginia-Portland Cement Co. v. *Swisher's Admr.*, 94 S. E. 159.

St. Louis I. N. & S. R. Co. v. *Yates*, 165 S. W. 282, 286.

Houlihan v. *Conn. River Company*, 42 N. E. 108.

Sinclair Oil & Gas Co. v. *Langley*, 293 S. W. 1015.

Headrick v. *H. D. Williams Cooperage Co.*, 134 S. W. 957.

FEDERAL CASES.

Thomson v. *Boles*, 123 F. (2d) 487.

Terminal R. Ass'n. of St. Louis v. *Farris*, 69 F. (2d) 779.

Norfolk & W. R. Co. v. *Riggs*, 98 F. (2d) 612.

Rocco v. *Lehigh Valley R. Co.*, 228 U. S. 275.

In *Thomson* v. *Boles, supra,* the authorities are cited and it is said:

> "Moreover, the departure, if any, from the usual and customary practice would not be a complete defense, but would merely constitute contributory negligence."

The applicable rule is well stated in White on Personal Injuries on Railroads, Vol. 1, page 377, that knowledge of the defect and failure to complain will not always work an assumption of risk "for the employe may have had reasonable ground to believe by the exercise of due care on his part that he could use the defective appliance without a resulting injury."

The following facts in the case at bar fully justified the trial court in submitting the case to the jury:

1. The condition was not *necessarily* dangerous nor certain to result in injury.
2. Petitioner's knowledge was so closely connected in point of time and action that there was no appreciable interval.
3. Petitioner had no opportunity to object to the master.
4. There was no evidence that petitioner freely and voluntarily consented to the condition.
5. The petitioner was under a duty not to delay the train and hence not to abandon that one, single task.
6. The unexpected release of the hook from the water spout acted in conjunction with the ice under his feet to cause the accident.

CONCLUSION.

In seeking merely a hearing on the merits in this case, petitioner believes that the language of Mr. Justice Murphy in *Jacob* v. *City of New York*, 62 S. Ct. 854, which is the latest decision of this tribunal dealing with assumption of risk, cannot be too strongly emphasized, as follows:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

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APPENDIX

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Federal Employers' Liability Act.

Act of April 22, 1908, c. 149, Sections 1, 3; 35 Stat. 65-66 (45 USCA para. 51, 53).

1. Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * *

3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by

such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Federal Safety Appliance Act, usually known as Boiler Inspection Act.

(45 USCA, Section 23; June 7, 1924, c. 355, No. 2, 43 Stat. 659.)

Use of unsafe locomotives and appurtenances unlawful; inspection and tests. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Rules of the Interstate Commerce Commission.

Tender...

152. Tender frames. (a) Tender frames shall be maintained in a safe and suitable condition for service.

(b) The difference in height between the deck on the tender and the cab floor or deck on the locomotive shall not exceed 1½ inches.

(c) The minimum width of the gangway between locomotive and tender, while standing on straight track, shall be 16 inches.

153. Feed water tanks. (a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

(b) Not less frequently than once each month the interior of the tank shall be inspected, and cleaned if necessary.

(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. Suitable covers shall be provided for filling holes.

(See official pamphlet of Interstate Commerce Commission, Bureau of Locomotive Inspection, orders dated October 11, 1915, to February 21, 1929, inclusive.)

(See also Roberts Fed. Liab. of Car., Vol. II, Appendix V, Pgs. 2068 and 2069.)

SECTION 4 AS AMENDED AUGUST 11, 1939.

(45 USCA 54, 1941 Cumulative Annual Pocket Part.)

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Exhibit A.

(Appellant's Appellate Court Brief.)

Respondent said in its Appellate Court brief (Exhibit A, p. 17):

> "If there was any ice on the deck of the tender it resulted from water unavoidably spattering onto the deck of the tender from the force of the water as the water is put in the tender by the crew."

Exhibit B.

(Appellee's Appellate Court Brief.)

On Page 9 of the argument Petitioner said:

> "Plaintiff made out a case of clear liability—a violation of the Safe Locomotive Act, one of the Federal Safety Appliance Acts. * * *
>
> "Plaintiff, in his complaint, makes two charges of a violation of this act. In one charge 'd,' the allegation is:
>
> "* * * this tender was unsafe because the top where plaintiff was required to work was slippery and covered with ice and other slippery materials * * * and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition * * *.'"

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OCTOBER TERM, A. D. 1942

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A CORPORATION,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR CERTIORARI

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Mindful of the applicable rule, we shall confine attention solely to certain erroneous and misleading statements in respondent's brief. The studied effort to convey the impression by quoting carefully selected excerpts from the evidence and the court's charge that "only one issue was tried" needs especially to be exposed.

Respondent's present attempt to make it appear that the sole issue tried was whether a crack existed in the tender is unworthy. In pleading, in proof, and in the court's charge this case was tried on the theory that defendant might be liable if its negligence or if its violation of the Safety Appliance Act in *either* of the respects alleged in Paragraphs D or E of the complaint caused the accident.

In submitting the Safety Appliance Act to the jury nowhere did the trial court restrict or confine its instruction exclusively to the existence or non-existence of the crack or leak—in nowise was the jury charged that a finding of a violation of the Safety Appliance Act would have to be predicated solely upon such a defect. The special interrogatory submitted at respondent's request contained no such limitation.

Significantly, respondent in quoting from the court's charge has omitted any reference to the following portions:

1. Wherein the court advised the jury that the action was brought under both the Federal Employers' Liability Act and the Safety Appliance Act, reading the latter verbatim (R. 175-176).

2. Wherein the court instructed the jury, "You are further instructed that under the law the defendant was bound to furnish to the plaintiff a locomotive, at the time in question, which was safe to be used, and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk" (R. 178).

3. Wherein the court advised the jury that one of the charges in plaintiff's complaint was that defendant required him, "on this occasion to work on the engine tank when this engine tank was unsafe and dangerous because defendant negligently allowed, caused and permitted ice to accumulate and be on the engine tank at the place where it required plaintiff to work, and that thereby, plaintiff was so at work, * * *" (R. 177).

4. Wherein the trial court instructed the jury that assumed risk was not available if defendant violated the Safety Appliance Act and instructed the jury that it would not prevent plaintiff from recovering if under the law and the evidence they found a violation of the Safety Appliance Act as charged in plaintiff's complaint (R. 179).

5. Wherein the court instructed the jury that "in the event you find the defendant did not violate any Safety Appliance Act, but that you do find under the evidence and instructions of the Court, that defendant was guilty of one of the other charges of negligence alleged in plaintiff's complaint, and further find that plaintiff was guilty of negligence contributing to his injury in this case, then plaintiff's contributory negligence does not bar him from recovering in this action but will affect any damages he is entitled to recover * * *" (R. 180).

6. Wherein the court at the request of respondent instructed the jury:

> "The Court instructs the jury that one of the charges of negligence against the defendant was that it negligently permitted ice to be and remain upon the deck of the tender. If you find from all the evidence under the instructions of the Court that the plaintiff was guilty of negligence which contributed to cause his injuries and that the injuries were sustained as a result of the defendant negligently permitting said ice to be and remain upon the deck of the tender and not because of any crack or leak in the tender, and if you further find that the defendant was guilty of negligence which contributed with the negligence of the plaintiff to cause his injuries, then it is your duty to diminish the amount * * *" (R. 185).

7. Wherein the court instructed the jury:

> "You are further instructed that if you believe from a preponderance of the evidence, under the instructions of the Court, that the defendant was guilty of negligence and unlawful conduct in any of the charges made in plaintiff's complaint, and that as a direct and proximate result and in consequence thereof plaintiff sustained injuries, as charged by the plaintiff, and that plaintiff did not assume the risk of his employment,

then you should find the defendant guilty, provided, however, that if you find, from a preponderance of the evidence and under the instructions of this Court, that the defendant is guilty of a violation of a Safety Appliance Act, as charged in plaintiff's complaint, then assumption of risk is no defense" (R. 180).

I.

The Application of a Controlling Rule of Law overlooked by an Inferior Court does not Involve a Change of Theory.

Petitioner's theory of the trial, in addition to a claim of general negligence, was that the Safety Appliance Act had been violated in two respects. The jury had a perfect right to adopt plaintiff's theory and to find that the Safety Appliance Act had been violated in the respect not involved in the special interrogatory. From the general verdict it is apparent that the jury may have properly so found.

If a case be pleaded and proved under the Safety Appliance Act, then whether the statute be referred to *eo nomine* is immaterial. For the purpose of this case Rule 153 of the Interstate Commerce Commission is a part of the statute. The rule is just as binding and controlling on a lower court as a decision of this court construing a Federal statute.

This Honorable Court has laid down the rule that where no express claim was made under an Act of Congress (Federal Employers' Liability Act), but where facts were expressly alleged and proof clearly established that the injury complained of was governed by the Federal Statute, then the Federal Act controls, even though not urged at the trial. *Grand Trunk Western Ry.* v. *Lindsay*, 233 U. S. 42, 34 S. Ct. 581.

That it is not necessary to refer to either the Safety Appliance Act or the Employers' Liability Act, or that even though the pleader mistakenly alleges a case under the State Act, this is immaterial and the court is presumed to be cognizant of the Federal statutes and to apply them was held in *Norfolk & W. Ry. Co.* v. *Hall*, 49 F. (2d) 692 and *Hines* v. *Smith*, 275 F. 766.

See also *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 35 S. Ct. 865.

Likewise, in *Kansas City W. R. Co.* v. *McAdow*, 240 U. S. 51, 36 S. Ct. 252, with reference to an amended pleading it was said:

> "The law governing the situation is equally the law of the state, whether derived from congress or the state legislature and must be noticed by the courts."

We recognize the well-settled rule that a party who has invited error and who has induced the court to commit it cannot later complain. We also recognize the equally elementary rule that a party cannot submit his case on one theory and "ask for a reversal upon another and inconsistent theory," as in *Snyder* v. *Snyder*, 142 Ill. 60. Nor do we question the universal proposition that parties who litigate by consent issues not made by the pleadings are bound by the determination (which principle, if applicable at all, militates against respondent here), as in *San Juan Light Company* v. *Requena*, 224 U. S. 89, and *M-K-T Ry. Co.* v. *Wilhoit*, 160 F. 440. The instant case does not come within either of the above categories; there has been no change or departure, no invited error, no submission of extraneous issues. Petitioner's counsel and the Appellate Court had simply overlooked an applicable rule of law which confirmed, fortified, and required that the result reached by the jury and the trial court be sustained.

II.

The Doctrine of the Ford Case has no Application under Rule 153.

The authorities relied upon by the respondent such as the *Reeves, Slater, Benson, Harlan,* and *Riley* cases are distinguishable for two reasons:

First, in such cases there was no claim of liability based on non-compliance with a standard set up by rule of the Interstate Commerce Commission.

Second, the case at bar is not one where the ice resulted "accidentally from some unforseen cause," but where as found by the trial court it was negligently deposited on the tender; nor is it a case where "a brakeman slips upon a running board coated with ice during a sleet storm."

III.

The Record with respect to Negligence and Assumption of Risk.

Respondent makes no answer to petitioner's argument that whether or no the Safety Appliance Act was violated and whether or no the amendment be retrospective, the questions of negligence and assumption of risk were for the jury. Respondent merely questions the accuracy of petitioner's statements and record references on the subject of its negligence in permitting the tank to overflow.

Note, however, that respondent is discreetly silent concerning its admission in the Appellate Court that if the ice was there (even respondent's evidence established its presence R. 102, 127) as found by the jury, it was because of the conduct of the "crew" (See Appendix, Exhibit B, on page 34 of the petition and brief). We regret that this

court will have to check the following pages of the record to ascertain whether the overflowing of the tank was an ordinary, unavoidable, common occurrence on the one hand, or as petitioner claims was unnecessary and contrary to the customs, practices and rules, to-wit (R. 34-35, 100-101, 118, 125, 130-131).

One can hardly conceive of conduct better calculated to break someone's neck than to permit water to flood an area six feet square upon the deck of a tender in actual service in freezing weather.

If as held in *Castle* v. *Union Pacific R. Co.*, 139 Minn. 396, 166 N. W. 767, the presence of particles of coal ranging from dust to the size of a walnut and located on the footboard of a switch engine is sufficient evidence that the hostler had negligently permitted it to spill over and remain there, despite his sworn testimony that he had brushed it off and removed all the particles, then it is difficult to understand why the presence of the ice on the tender together with the evidence showing that water would not get there unless the employees had unnecessarily and contrary to the rule and practice permitted it to overflow, should not be sufficient to sustain a finding of negligence in the case at bar.

IV.

The Weight and Credibility of Testimony was for the Jury.

Respondent's argument that petitioner committed perjury was presented to and rejected by the tribunal constitutionally appointed to try the issue. Such argument overlooks the fact that the verdict was for the petitioner and not for the respondent. It ignores the field of mistake. It misinterprets the issue and improperly extends the operative scope of a civil verdict. Respondent forgets that the *falsus in uno* charge was submitted at its own request.

Apparently respondent is under the impression that there is some rule of law to the effect that only its employees who are not injured and who testify for their master are honest, truthful and reliable.

The charge is a false and cowardly one and is tantamount to the *argumentum ad hominem*, which is always a confession of weakness.

Would counsel concede that the general verdict in favor of the petitioner establishes the perjury of all of respondent's witnesses on the other features of the case? If by the answer to the special interrogatory the jury has found that petitioner was wrong with respect to the existence of a crack or a leak, then has not the same tribunal with equal conclusiveness found by the general verdict under the charge of the court that respondent and its witnesses were wrong on the other features submitted to them?

The assertion that the trial almost in its entirety centered about the charge with reference to the crack in the tender is likely to mislead the reader. There was abundant evidence upon both sides with respect to the proper and careful method of filling the tank without overflow and with reference to the impropriety, self-evident anyway, of permitting it to spill on the deck.

CONCLUSION.

It is respectfully submitted that petitioner is entitled to a hearing upon the merits in this court.

Respectfully submitted,

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Brief for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D 1942

No. 124

NORVELL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

Brief for Petitioner.

I.

OPINION OF COURT BELOW.

The opinion of the Appellate Court of Illinois is reported in *Lilly* v. *Grand Trunk Western Railroad Company*, 312 Ill. App. 73, 37 N. E. (2d) 888. It will also be found in the Record, page 131 *et seq.*

II.

STATEMENT OF JURISDICTIONAL GROUNDS.

This action is predicated upon the Employers' Liability Act and the Locomotive Boiler Inspection Act of the United States.

The train involved carried interstate commerce (R. 14) and both the trial and appellate courts found that the rights and liabilities of the parties were to be determined by the federal statutes. The judgment of the Appellate Court of Illinois sought to be reviewed was entered November 28, 1941 (R. 139). The petition for leave to appeal to the Supreme Court of Illinois was denied by that court on March 13, 1942 (R. 163-4), making the judgment of the Appellate Court final. The jurisdiction of this Court, which granted a Writ of Certiorari on October 12, 1942, is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, and cases believed to sustain jurisdiction are *Chesapeake & O. R. Co.* v. *Mihas*, 280 U. S. 102, and *Chicago G. W. R. Co.* v. *Rambo*, 298 U. S. 99.

III.

STATEMENT OF THE CASE.

A. Procedural History.

This action was brought to recover damages for personal injuries sustained by petitioner, a brakeman employed in interstate commerce, at Ferndale, Michigan, on February 6, 1937. The petitioner fell from the tender of a locomotive while he was pulling a water spout over the manhole by means of a long pole, preparatory to filling the tank with water. The accident resulted when the pole and its hook slipped on the water spout and his feet simultaneously slipped on ice on the top of the tender.

A general verdict of $32,500.00 was returned by the jury and sustained by the trial Court (R. 8, 115), but upon appeal by respondent the Appellate Court of Illinois ordered judgment in favor of respondent notwithstanding the verdict. The severity of petitioner's injuries was such

that the amount of the verdict was not questioned either in the trial court or upon appeal.

B. The Pleadings.

Insofar as presently material the complaint charged general negligence with respect to the presence of the ice on the tender (R. 3-4) and, further, alleged a violation of those provisions of the Safety Appliance Acts more properly referred to as the Boiler Inspection Act in two separate and specific respects:

> Paragraph 4, d. That by reason of ice and other slippery materials the tender was in an improper condition and was unsafe to operate in the service without unnecessary peril to life and limb (R. 4);
>
> Paragraph 4, e. That by reason of a crack or hole which permitted leakage, the tender was in an improper condition and was unsafe to operate in the service without unnecessary peril to life and limb (R. 6).

Respondent denied the above charges and pleaded assumption of risk and contributory negligence as complete defenses. At its request, a special interrogatory was submitted to the jury (R. 114) and answered in the negative, inquiring as to whether there was any leak near the manhole collar. The Appellate Court accorded a finality to the jury's answer which it was unwilling to give the verdict on the other fact issues in the case. For present purposes we will assume *arguendo* that the answer to the interrogatory eliminates from the case any claim of defect in the tender itself, leaving such questions only as arose from the presence of the ice upon the tender from negligent causes as a violation of the Boiler Inspection Act and as common law negligence.

The special interrogatory related solely to charge "e." above and the Appellate Court of Illinois either inadvertently overlooked or purposely ignored the application of the Boiler Inspection Act to charge "d." above. It seems clear as indicated by the trial Court (R. 115) that the answer to this interrogatory in no wise removed the charge that the Safety Appliance Act or the Boiler Inspection Act had been violated because the tender was unsafe due to ice resulting from the negligence of another servant.

C. Statement of Facts.

The main line of the Grand Trunk Western Railroad Company runs in an easterly and westerly direction through Ferndale, Michigan. The run upon which petitioner was working extended for about 60 miles from Detroit to Durand in the State of Michigan. The train was known as No. 481 with engine No. 3521. The engine and crew left Durand the day before, went to Detroit with the train and laid over night, and were making the return trip to Durand at the time of the accident.

On the morning of February 6, 1937, petitioner was called for work as a brakeman on this local way freight (R. 12). His crew left Detroit at about 7:15 A. M. with their engine and caboose and went to the Ferndale yards where they made up their train (R. 12-13). The tender had been filled with water by the hostler or his helper before leaving the Detroit roundhouse that morning (R. 21-22, 139). No water was put in the tank after leaving the roundhouse (R. 21).

The crew then made up the train by various switching operations (R. 12-13), and when it was completed and ready to leave for Durand, the engineer decided to take water before their departure, ordering petitioner to uncouple the engine so it could be taken to the water spout

(R. 13). When the engine arrived at the water spout, petitioner crawled up on top in the usual way to take water (R. 13).

When he got around in front of the manhole, which is about 10 or 12 inches high and about 3 feet long (R. 23), there was an area of ice about 6 feet square (R. 55). There was no ice on the rear end where he got on (R. 55); it was from the front side of the manhole to the coal chute (R. 55). The water spout is pulled over the manhole of the tender by means of a long pole with a hook attached thereto. He found the pole embedded in the ice where it had frozen, and he had to kick it out and knock the ice off (R. 55). While petitioner said the ice covered an area 6 feet square (R. 55), some of the respondent's witnesses characterized it as a little or very little ice (R. 72-84). All the ice was behind the fuel space and within the prohibitions of Rule 153 (R. 55, Photographs, R. 76a-d).

After kicking and knocking off the ice petitioner then braced himself with his feet astride, reached over for the water spout and started to pull it into position, when the hook slipped on the water spout and his feet slipped on the ice, causing him to lose his balance and fall to the ground (R. 13-55).

The ice was not deposited on the tender by natural causes (R. 19, 23, 71). There had been neither rain nor snow (id.). It was freezing weather (R. 19-23).

It was admitted on page 17 of respondent's brief in the Appellate Court that the water spattered onto the deck when employes filled the tank (Exhibit A, Brief and Argument of Appellant in Appellate Court of Illinois, page 17). Under the rules and practice, while the tank should be loaded full, the water should not be permitted to overflow (R. 25-26, 71, 78, 82-87). There is a controlling device to gauge the flow and to prevent any overflow (R. 25-26, 86-

87), and water will not spill or slop over unless the employ filling the tank unnecessarily and carelessly permits it to do so (R. 24-25, 71, 78, 82, 86-87).

Petitioner testified that it was easy to keep the water from slopping and he had never seen employes let it do so (R. 25-26). Respondent's evidence was to the same effect: Findley testified that he could regulate the flow so as to get just enough water without overflowing if he handled it right and he usually did (R. 86); Granger testified that the rule is that tanks are to be filled so they don't overflow (R. 71); Holton testified that there is a regulator so that a fellow can gauge the stream just the way he wants it (R. 78); and Smith testified that it is the rule not to let the water go over the top, and that one can prevent it by handling it right (R. 82).

An experienced employe had never seen a manhole cover so defective that the water splashed out (R. 78). It is interesting to note that approximately 4 hours after the accident, the claim agent instructed engineer Granger "to inspect for leaks that might cause ice on the deck" (R. 72). It appears that coal and coal dust will sometimes clog up the water drains on a tender (R. 56). It may be noted that the fireman who finished the job of filling the tank with water after the accident said it was down about 18 or 20 inches (R. 81).

In view of the jury's finding that there was no crack or leak in the tender, it is certain that they also found under the general verdict for petitioner that the water accumulated and froze because of a violation of the rule and customary practice referred to above. These two findings are not at all inconsistent. Accepting the answer to the special interrogatory as final under the decision of the Appellate Court, there is, indeed, no other rational conclusion possible under the evidence.

IV.

SPECIFICATION OF ERRORS.

The Supreme and Appellate Courts of Illinois erred:

1. In holding as a matter of law that there was no violation of the Safety Appliance Act or Boiler Inspection Act.

2. In holding as a matter of law that the evidence was insufficient to warrant a finding that respondent was negligent.

3. In holding that it conclusively appeared as a matter of law that petitioner assumed the risk.

4. In holding that the defense of assumption of risk was available to respondent.

V.

SUMMARY OF ARGUMENT AND AUTHORITIES.

A.

The evidence required or permitted a finding that the Boiler Inspection Act had been violated.

1. If the rule of the Commission were violated the engine was unsafe within the meaning of the Act.

U. S. v. *B. & O. R. Co.*, 293 U. S. 454.
B. & O. R. Co. v. *Groeger*, 266 U. S. 521

2. The statutory liability is absolute and mandatory and not dependent upon negligence.

Brady v. *Terminal R. Assn. of St. L.*, 303 U. S. 10.
Southern R. Co. v. *Lunsford*, 297 U. S. 398.

Baltimore & O. R. Co. v. *Groeger*, 266 U. S. 521.

U. S. v. *B. & O. R. Co.*, 293 U. S. 454.

Lehigh Valley R. Co. v. *Beltz*, 10 F. (2d) 74.

3. The Act should receive a liberal construction.

St. Louis I. M. & S. R. Co. v. *Taylor*, 210 U. S. 281.

Louisville & N. R. Co. v. *Layton*, 243 U. S. 617.

Swinson v. *Chicago, St. P. M. & O. Ry. Co.*, 294 U. S. 529.

Brady v. *Terminal R. Assn. of St. L.*, 303 U. S. 10.

4. It is the duty of the Court to take judicial notice of the rules of the Commission.

Roberts, Federal Liabilities of Carriers, Vol. 2, Sec. 1020.

Caha v. *U. S.*, 152 U. S. 211.

Jenkins v. *Collard*, 145 U. S. 546.

Knight v. *U. S. Land Ass'n.*, 142 U. S. 161.

Thompson v. *Missouri Pac. R. Co.*, 15 F. (2d) 28.

Goulette's Admr. v. *Grand Trunk Ry. Co.*, 93 Vt. 266, 107 A. 118.

5. The Court will apply the Federal Act upon appeal even though not mentioned or urged at the trial.

Grand Trunk Western Ry. v. *Lindsay*, 233 U. S. 42.

Norfolk & W. Ry. Co. v. *Hall*, 49 F. (2d) 692.

Thompson v. *Hocking Valley R. Co.*, 45 F. (2d) 155.

Hines v. *Smith*, 275 F. 766.

Central Vermont Ry. Co. v. *White*, 238 U. S. 507.

Kansas City W. R. Co. v. *McAdow*, 240 U. S. 51.

6. The Act was violated as a matter of law.

45 U. S. C. A. 23; June 7, 1924; c. 355, 45 Stat. 659.

Rule 153(a), (c).—Interstate Commerce Commission—Roberts, Federal Liabilities of Carriers, Vol. 2, appendix 5, pages 2068 and 2069.

7. The question was for the jury.

Anderson v. *B. & O. R. Co.*, 89 F. (2d) 629, Cert. den. 302 U. S. 696.

B.

The evidence warranted a finding respondent was negligent.

1. Care must be commensurate to the risk.

Glynn v. *Krippner*, 60 F. (2d) 406.

Atlantic Refining Co. v. *Smith*, 94 F. (2d) 377.

Grand Trunk R. Co. v. *Richardson*, 91 U. S. 454.

2. The presence of the ice established a prima facie case of negligence.

Castle v. *Union Pac. R. Co.*, 139 Minn. 396; 166 N. W. 767.

Sears Roebuck & Co. v. *Peterson*, 76 F. (2d) 243.

York v. *Chicago, M. & St. P. Ry. Co.*, 184 Wis. 110; 198 N. W. 377.

Bell v. *Terminal R. of St. L.*, 322 Mo. 886; 18 S. W. (2d) 40.

Missouri Pac. R. Co. v. *Boyd*, 194 Ark. 121; 106 S. W. (2d) 165.

Rock Island v. *Matthews*, 185 Ark. 724; 49 S. W. (2d) 392. Cert. den. 287 U. S. 640.

Crabtree v. *Western Pac. R. Co.*, (Cal.) 90 P. (2d) 835.

Jersey City Stockyards v. *Grobner*, 5 F. (2d) 963.

Northern Pac. Ry. Co. v. *Berven*, 73 F. (2d) 687.

Gulf C. & S. F. Ry. Co. v. *Crow*, (Tex.) 220 S. W. 237.

3. The Court should not speculate to find a defense.

Kulp v. *C. St. P. M. & O. Ry. Co.*, 88 F. (2d) 466, Cert. den. 301 U. S. 700.

Terminal R. Ass'n. of St. L. v. *Farris*, 69 F. (2d) 779.

4. Custom is the standard of care.

68 A. L. R. 1400.

Tex. & Pac. R. Co. v. *Behymer*, 189 U. S. 468.

5. If reasonable minds may disagree, the issue is for the jury.

Gunning v. *Cooley*, 281 U. S. 90.

Railroad Co. v. *Stout*, 17 Wallace 657.

C.

The petitioner did not assume the risk as a matter of law.

1. Assumed risk was properly submitted to the jury.

(a) This defense is based on *Volenti non fit injuria*.

Fitzgerald v. *Conn. River Paper Co.*, 155 Mass. 155, 29 N. E. 464.

Mahoney v. *Doré*, 155 Mass. 513, 30 N. E. 366.

C. N. O. & T. P. Ry. Co. v. *Thompson*, 236 F. 1.

Olney v. *Boston & M. Ry. Co.*, 71 N. H. 427; 52 A. 1097.

3 Labatt, Master and Servant, (2d Ed.) Sec. 1304, p. 3660.

Thomas v. *Quartermaine*, 18 Q. B. D. 685, 696.

Yarmouth v. *France*, 19 Q. B. D. 647.

(b) The defense is not a favored one and the burden of proof is on the Master.

Kanawaha & M. R. Co. v. *Kerse*, 239 U. S. 576.

39 C. J., sec. 891, p. 689.

Tex. & Pac. R. Co. v. *Archibald*, 170 U. S. 665.

C. R. I. & P. Ry. Co. v. *Ward*, 252 U. S. 18.

Chesapeake & O. R. Co. v. *Proffit*, 241 U. S. 462.

(c) Great care should be exercised not to sacrifice the servant's rights by confusing contributory negligence with assumption of risk.

Schlemmer v. *Buffalo R. & P. R. Co.*, 205 U. S. 1.

Cross v. *C. B. & Q. R. Co.*, 191 Mo. App. 202, 186 S. W. 1130.

Chicago & E. R. Co. v. *Penn*, 191 F. 682.

Atlas Portland Cement Co. v. *Hagen*, 233 F. 24.

(d) Walking on ice may be contributory negligence and is not assumption of risk.

13 A. L. R. 73.

Great Atlantic & Pac. Tea Co. v. *Chapman*, 72 F. (2d) 113.

Phillips Petroleum Co. v. *Childress*, 78 F. (2d) 861.

Lord Baltimore Filling Stations v. *Miller*, 110 F. (2d) 698.

(e) Where a railroad employe steps on a slippery substance, his conduct is not assumption of risk.

Mason & O. R. Co. v. *Yockey*, 103 F. 265.

Bell v. *Terminal R. of St. L.*, 322 Mo. 886; 18 S. W. (2d) 40

Missouri Pac R. Co. v. *Boyd*, 194 Ark. 121; 106 S. W. (2d) 165.

York v. *Chicago, M. & St. P. Ry. Co.*, 184 Wis. 110; 198 N. W. 377.

Reams v. *Chicago M. St. P. & P. R. Co.*, 180 Minn. 534, 231 N. W. 236.

Melody v. *Des Moines Union Ry. Co.*, 161 Ia. 695; 141 N. W. 438.

New York, N. H. & H. R. Co. v. *Branstreeter*, 200 F. 255.

See also:

Cincinnati N. O. & T. P. Ry. Co. v. *Thompson*, 236 F. 1.

Chicago, R. I. & P. Ry. Co. v. *King*, 165 Okla. 169; 25 P. (2d) 304.

Pitcairn v. *Hunault*, 86 F. (2d) 664.

McCarthy v. *Palmer*, 113 F. 721.

Northern Pac. Ry. Co. v. *Berven*, 73 F. (2d) 687.

Leonidas v. *Great Northern Ry. Co.*, 30 Mont. 446, 76 P. (2d) 1007, Aff. 305 U. S. 1.

(f) Failure to choose the safe course is contributory negligence and not assumption of risk.

Anzolotti v. *McAdoo*, 262 F. 568.

Thomson v. *Boles*, 123 F. (2d) 487.

Terminal R. Ass'n. of St. L. v. *Farris*, 69 F. (2d) 779.

Norfolk & W. R. Co. v. *Riggs*, 98 F. (2d) 612.

Rocco v. *Lehigh Valley R. Co.*, 228 U. S. 275.

(See State citations cited in brief.)

(g) The employe is entitled to time for deliberation, choice and assent.

Olney v. *Boston, & M. Ry. Co.*, 71 N. H., 427, 52 A. 1097.

3 Labatt, Master and Servant (2d Ed.) Sec. 1304, p. 3660.

Southern Pac. R. Co. v. *Yeargin*, 109 F. 436, Cert. den. 183 U. S. 695.

C. N. O. & T. P. Ry. Co. v. *Thompson*, 236 F. 1.

White, Personal Injuries on Railroads, Vol. 1, p. 377.

1 Shearman and Redfield, Negligence, (6th Ed.) Sec. 211.

(h) A railroad employe is not required to abandon the service.

Mason & O. R. Co. v. *Yockey*, 103 F. 265.

Kane v. *Northern Cent. Ry. Co.*, 128 U. S. 91.

D.

The amendment of 1939 was retroactive.

(a) The defense of assumed risk is not a vested right

Arizona Copper Co. v. *Hammer*, 250 U. S. 400.

Campbell v. *Holt*, 115 U. S. 620.

Cooley, Principles of Constitutional Law, 3d Ed., p. 360-1.

(b) The use of the past tense in the word "brought" makes the amendment retroactive.

Hine v. *Belden*, 29 Conn. 384.

Link v. *Receivers of Seaboard Airline Ry. Co.*, 73 F. (2d) 149.

(c) An appellate court must apply any law enacted before decision.

Vandenbark v. *Owens-Ill. Glass Co.*, 311 U. S. 538.

U. S. v. *Schooner Peggy*, 1 Cranch 103.

South Carolina v. *Gaillard*, 101 U. S. 433.

Ewell v. *Daggs*, 108 U. S. 143.

Railroad v. *Grant*, 98 U. S. 398.

Carpenter v. *Wabash R. Co.*, 309 U. S. 23.

Wall v. *Chesapeake & O. Ry. Co.*, 290 Ill. 227; 125 N. E. 20.

(d) Remedial legislation may and should be construed retroactively.

Levy v. *Birnschein*, 206 Wis. 486; 240 N. W. 140.

Lewis Sutherland, Statutory Construction, Vol. 2, p. 1227.

McGuire v. *Cunningham*, 80 Cal. 553; 22 P. 839.

Dehan v. *Hotel & Restaurant Employees, etc.*, (La. App.) 159 So. 637.

DeMarse v. *Bruckman*, 298 N. Y. S., 736.

Bartley v. *Boston, etc. Ry.*, 198 Mass. 163, 83 N. E. 1093.

VI.

ARGUMENT.

Prefatory Statement.

At the threshold of the argument several queries present themselves:

First, is the evidence such as either to require a finding by the Court or to permit a finding by the jury that the Boiler Inspection Act had been violated?

If the above question be answered in the affirmative with respect to either aspect, the decision of the Appellate Court must be reversed and the original judgment in favor of the petitioner must be reinstated without reference to the doctrine of assumed risk and common law negligence, which then becomes wholly immaterial. If the above questions in both aspects be answered in the negative, then the third query is:

Third, was the evidence sufficient to sustain a finding by the jury that respondent was negligent?

If so, the fourth question arises:

Fourth, did petitioner assume the risk as a matter of law?

It may be noted that where only a motion *non obstante verdicto* is filed, as in this case, the petitioner is entitled to have the evidence and the inferences to be drawn therefrom viewed in their aspects most favorable to his case. *Russell* v. *Richardson*, 302 Ill. App. 589, 24 N. E. (2d) 185; *Goodrich* v. *Sprague*, 376 Ill. 80, 32 N. E. (2d) 897.

A.

The evidence required or permitted a finding that the Boiler Inspection Act had been violated.

The trial Court instructed the jury that the action was brought under both the Federal Employers' Liability Act

and the Safety Appliance Act, reading verbatim the so-called Boiler Inspection Act in its charge (R. ~~175-6~~). The jury was further instructed "that under the law the defendant was bound to furnish the plaintiff a locomotive, at the time in question, which was safe to be used, and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk" (R. ~~178~~). Nowhere was the jury limited in considering the Safety Appliance Act or the Boiler Inspection Act to that feature thereof involved in the special interrogatory nor was any such limitation requested by the respondent.

Under the Court's charge the jury had a perfect right to adopt petitioner's theory that the Safety Appliance Act had been violated in the respect not involved in the special interrogatory, and from the general verdict it is apparent that the jury may have properly so found. We propose to demonstrate that this finding should be sustained under the applicable law.

Congress in 1893 first inaugurated the policy of protecting railroad employes by a series of statutes with reference to brakes, couplers, grab irons, hand holds, drawbars, sill steps, etc., commonly referred to as the Safety Appliance Acts. On February 17, 1911, c. 3, 36 Stat. 2, Congress extended the Safety Appliance Acts to "the boiler of said locomotive and appurtenances thereto." This extension is commonly known as the Boiler Inspection Act. On March 4, 1915, c. 169, 38 Stat. 1192, Congress extended the Boiler Inspection Act to include the entire locomotive and tender and all parts and appurtenances thereof. On June 7, 1924, c. 355, 43 Stat. 659, its phraseology was again amended. It provided (45 U. S. C. A. 23; June 7, 1924, c. 355, 43 Stat. 659):

> "Use of unsafe locomotives and appurtenances unlawful; inspection and tests. It shall be unlawful for any carrier to use or permit to be used on its line any

locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Under the authority conferred the Interstate Commerce Commission issued Rule 153 which provides (Official Pamphlet of Interstate Commerce Commission, Bureau of Locomotive Inspection, Orders dated October 11, 1915, to February 21, 1929, inclusive; see also Roberts, Federal Liabilities of Carriers, Vol. 2, appendix 5, pages 2068 and 2069):

"TENDERS.

"Rule 153.(a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service.

* * *

"(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water.

* * * *"

It seems hardly necessary to add that the purpose of the original Act as supplemented by Rule 153 is to insure the removal of any foreign or extraneous material that might endanger the safety of employes. The words safe, proper and suitable are of plain and simple meaning. Rule 153 specifically provides for the removal of waste water. The word "clean" obviously has connotations of safety rather

than of purity. It was no doubt promulgated because of the general knowledge that in cold weather if means are not provided to carry off the waste water and it is permitted to remain on the tender and freeze, it will subject the employe to the very danger which brought about the tragic accident to petitioner.

This rule was in effect at the time of the accident, became an integral part of the Act itself and was controlling upon the lower Courts, because, as said by Justice Brandeis in *U. S.* v. *B. & O. R. Co.*, 293 U. S. 454:

> "When the rules have not been complied with which were issued by the Commission the engine is unsafe within the meaning of the Boiler Inspection Act."

The rule is well stated in *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521:

> "The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard."

The issue as to whether ice thereon constituted a violation of the Act was raised by the pleadings and submitted to the jury (R. 4, 116, 117-118). In sustaining the verdict under the Act, despite the answer to the special interrogatory, the trial Court stated:

> "Now, whether there was a crack or not, yet still the question of the safety appliance could remain in there if the court did feel that it was the duty of the defendant to keep the tender clear so that the man might operate. I don't know about that. It might be" (R. 115).

Where there is a violation of the Act, neither contributory negligence (45 U. S. C. A. 53) nor assumption of risk, (45 U. S. C. A. 54) constitutes a defense, either total or partial. Both defenses are completely eliminated from consideration. Furthermore, this Court has held that the duty of the carrier under the Act is absolute and mandatory and makes the railroad company an insurer. As said by Mr. Justice Hughes in *Brady* v. *Terminal R. Assn. of St. L.*, 303 U. S. 10:

> "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous."

See also to the same effect *Southern R. Co.* v. *Lunsford*, 297 U. S. 398; *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521; *U. S.* v. *Baltimore & O. R. Co.*, 293 U. S. 454; *Lehigh Valley R. Co.* v. *Beltz*, 10 F. (2d) 74, cert. den. 270 U. S. 641.

In the consideration of doubtful questions this Court has disapproved of a strict or narrow or technical construction of the Safety Appliances Acts, adopting a liberal policy to effectuate their humanitarian purpose. *St. Louis I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281; *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617; *Swinson* v. *Chicago, St. P. M. & O. Ry. Co.*, 294 U. S. 529; *Brady* v. *Terminal R. Co.*, 303 U. S. 10. As said in the *Taylor* case, *supra*:

> "Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, so far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon

those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard."

The only argument advanced by respondent to meet these contentions is that Rule 153 was overlooked by petitioner's counsel and the members of the Appellate Court until the petition for rehearing was filed, with the further suggestion that reliance upon it now involves a "change of theory." It is a complete reply to assert that if this rule is a part of the Act itself, as held in *U. S.* v. *B. & O. R. Co.*, 293 U. S. 454, then the Court must take judicial notice of the rules as well as the Act itself. Roberts, in Federal Liabilities of Carriers, Vol 2, Sec. 1020, states:

> "*Judicial notice of orders of Interstate Commerce Commission.* * * * Thus the courts will take judicial notice of the orders of the Interstate Commerce Commission pursuant to the authority delegated to it in the Safety Appliance Act and other federal safety statutes."

The author in support of the text cites *Caha* v. *U. S.*, 152 U. S. 211; *Jenkins* v. *Collard*, 145 U. S. 546; *Knight* v. *U. S. Land Assn.*, 142 U. S. 161. In *Thompson* v. *Missouri Pacific R. Co.*, 15 F. (2d) 28, the Court took judicial notice of the Safety Appliance Act and that under orders of the Interstate Commerce Commission ladders on freight cars have been standardized. In *Goulette's Admr.* v. *Grand Trunk Ry. Co.*; 93 Vt. 266, 107 A. 118, it was said:

> "In actions under the Federal Employers' Liability Act the Courts will take judicial notice of standards established by orders of the Interstate Commerce Commission pursuant to authority granted by the Safety Appliance Act."

This case has been tried and presented by petitioner throughout on the theory that the Act was violated in not

merely the one respect foreclosed by the answer to the special interrogatory, but by the mere presence of the ice itself. The trial Court apparently had the same idea (R. 115). In petitioner's brief in the Appellate Court on page 9 thereof he claimed that he had made out a clear violation of the Act and referred to his complaint as making "two charges of a violation of this Act," one of them being the allegation that the tender was slippery and covered with ice. (Exhibit B, Brief and Argument for Appellee filed in Appellate Court, page 9). Therefore, the fact that Rule 153 was not urged upon the Appellate Court of Illinois until the petition for rehearing is of no significance. It was therein fully discussed (R. 140 to 148) and was likewise called to the attention of the Supreme Court of Illinois in the petition for leave to appeal (R. 150 to 162). This Court has held that where the facts alleged and the proof adduced clearly established that the injury complained of was governed by the Federal Act, then this statute controls even though not urged at the trial. *Grand Trunk Western Ry.* v. *Lindsay*, 233 U. S. 42. In that case the Federal Act was regarded as controlling and it was held not error for the reviewing Court to test the correctness of the rulings of the trial Court by the Employers' Liability Act, even though it had not been urged or considered below.

That it is not necessary to refer either to the Safety Appliance Act or the Employers' Liability Act, or that even though the pleader mistakenly alleges a case under the State Act, this is immaterial and the Court is presumed to be cognizant of the Federal statutes and to apply them, was held in *Norfolk & W. Ry. Co.* v. *Hall*, 49 F. (2d) 692, and *Hines* v. *Smith*, 275 F. 766. See also *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507 and *Kansas City W. R. Co.* v. *McAdow*, 240 U. S. 51. As said in *A. T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471, "The regulation having been made by the Commission in pursuance of constitutional

statutory authority, it has the same force as if prescribed in terms by the statute."

The application of a controlling rule of law overlooked by an inferior Court does not involve a change of theory. The situation is identical to that existing where both counsel and the lower Court merely overlook a controlling authority, for example, a decision by this Court. There is no change to a different or inconsistent theory of a cause of action or a defense. In the case at bar petitioner's counsel and the Appellate Court had simply overlooked an applicable rule of law which confirmed, fortified and required that the result reached by the jury and the trial Court be sustained, and in seeking here a decision in accord with the controlling principles of law, we are not changing the theory of the case at all.

The elementary rules relied upon by respondent that one who has invited error and induced the Court to commit it cannot later complain, that a party cannot submit his case on one theory and ask for a reversal upon *another and inconsistent theory*, and that parties are bound by the determination of issues not made by the pleadings but litigated by consent, have not the remotest application to the instant situation, which falls within an altogether different category. Respondent seeks to bind petitioner by the mere statement of his counsel in the closing argument that a negative answer to the special interrogatory would put his client out of court. This was a mere expression of opinion, clearly erroneous under the law. It binds neither court nor client. It is absurd to suppose that a lawyer could thus change the governing and applicable rules of law. The statement was made in a context which indicates that it could not and should not be accepted with the literal interpretation placed upon it by respondent (R. 113).

Even had counsel failed to urge the liability of the railroad company under the Act, yet if the proof shows a vio-

lation, it is the duty of the Court to take cognizance of it and to enforce the law as held in *Thompson* v. *Hocking Valley R. Co.*, (6 Cir.) 45 F. (2d) 155. The Court there said that if the appliance was really unsafe and the plaintiff was entitled to recover under the Act, "The shortcomings of counsel ought not to be given fatal effect."

The authorities relied upon by respondent as holding that the mere presence of ice upon the tender does not establish a violation of the Act are distinguishable in that none of them involved a claim of liability based upon non-compliance with the standard set up by a rule of the Interstate Commerce Commission. Typical is *Ford* v. *New York, N. H. & H. R. Co.*, 54 F. (2d) 342, cert. den. 285 U. S. 549, holding that grease upon a handhold did not constitute a violation of the Safety Appliance Act. In that case the rule of the Interstate Commerce Commission prescribed only the size, dimensions and mechanical construction of the handhold. It did not require that it should be kept clean or free from grease. Here the rule requires that the tender be kept clean and free from waste water. Therefore, the very element which was absent in the *Ford* case is present in the case at bar, and, furthermore, in the *Ford* case the grease was not attributed to a negligent origin but reliance was placed solely upon the Boiler Inspection Act.

The *Ford* case was distinguished in *Anderson* v. *B. & O. R. Co.*, (2 Cir.) 89 F. (2d) 629, Cert. den. 302 U. S. 696, involving Rule 120 of the Commission requiring locomotives to be "equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service and tested before each trip." In wet and rainy weather the sanding pipes became clogged, and yet the Court held, "On the issue of violation of the Boiler Inspection Act and Rule 120 there was evidence enough to go to the jury."

B.

The evidence warrants a finding respondent was negligent.

The Courts below held that the evidence of negligence was insufficient because, first, the origin of the water and ice did not appear, and, secondly, respondent had no notice of its existence. We shall discuss these questions in the order indicated.

Neither the water previously nor the ice into which it was converted was created by natural causes. There had been neither rain nor snow. It was freezing weather (R. 19, 23, 71).

In truth and in fact, the origin of the water and the ice did appear and it was established that it had accumulated because the employe or employes who previously filled the tank had negligently, in contravention of the rules and practices, permitted an overflow (R. 19-20, 24-25, 70-71, 78, 82, 86-87). The origin of the ice was no mystery to the respondent when it prepared its brief in the Appellate Court, because on page 17 it was there stated, "If there was any ice on the deck of the tender, it resulted from water unavoidably spattering onto the deck of the tender from the force of the water as the water is put in the tender by the crew" (Exhibit A, Brief and Argument for Appellant filed in Appellate Court, page 17).

It is settled that the degree of care required must be commensurate with the risk; it depends on both the likelihood of injury and the gravity thereof. It depends upon the circumstances of each particular case, the greater care being required for the greater danger. The controlling test is, what should a reasonably prudent person have

done in view of the danger and the risk. The care must be in proportion to the danger..

Chicago, M. & St. P. R. Co. v. *Moore* (8 Cir.), 166 F. 663.

Glynn v. *Krippner* (8 Cir.), 60 F. (2d) 406.

Grand Trunk R. Co. v. *Richardson*, 91 U. S. 454.

In re Spencer Kellogg & Sons, 52 F. (2d) 129.

Ensign-Bickford Company v. *Reeves*, 95 F. (2d) 190.

Leach v. *St. L. S. F. Ry. Co.*, 48 F. (2d) 722.

Atlantic Refining Co. v. *Smith*, 94 F. (2d) 377, Cert. den. 303 U. S. 658.

The fact that the Interstate Commerce Commission has prohibited the accumulation of waste water by a specific rule, and the fact that this rule to the knowledge of the company had been in effect for many years, is itself indicative that reasonable foresight should have anticipated and guarded against the presence of such water and the resulting ice. One can hardly conceive of conduct better calculated to break someone's neck than to permit water to flood an area six feet square upon the deck of a tender in actual service in freezing weather. Even without Rule 153, the dictates of ordinary prudence should require that any such danger be eliminated insofar as possible.

If as held in *Castle* v. *Union Pac. R. Co.*, 139 Minn. 396, 166 N. W. 767, the presence of particles of coal ranging from dust to the size of a walnut and located on the footboard of a switch engine is sufficient evidence that the hostler had negligently permitted them to spill over and remain there, despite his sworn testimony that he had brushed them off and removed all the particles, then it is difficult to understand why the presence of the ice on the tender together with the evidence showing that water would not get there unless the employes had unnecessarily

and contrary to the rule and practice permitted it to overflow, should not be sufficient to sustain a finding of negligence in the case at bar.

The general principle applicable here was well expressed in *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, as follows:

> "The duty of the master to use reasonable diligence to provide a safe place for employes to work, to carry on the occupation in which they are employed is too well settled to require much consideration now. This duty is a continuing one and discharged only when the master provides and maintains a place of that character."

As established by the record and as indicated in respondent's brief in the Appellate Court, the origin of the water is directly traceable to the conduct of respondent's employees. There is no other way the ice could have formed unless we are to suppose that some trespasser, unobserved by the crew, stole his way to the top of the tender and thence to the area between the manhole cover and the fuel space and spread a pail of water over a six foot area at some unknown time between the departure from the roundhouse at Detroit and the arrival in the yards or during the switching operations at Ferndale. As held in *Kulp* v. *C. St. P. M. & O. Ry. Co.*, 88 F. (2d) 466, Cert. den. 301 U. S. 700, such speculation to find a defense is not permissible:

> "In the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of."

More precisely in point is *Terminal R. Ass'n of St. L.* v. *Farris*, 69 F. (2d) 779, 785, where the origin of the sand

which interfered with an interlocking system was traceable to the defendant only by inference, but it was said:

> "The fact that hypotheses incompatible with the liability of appellant may be conjectured or imagined, when such are not based on any testimony in the case, affords no reason to reverse a verdict and judgment which is supported by the testimony."

It is thoroughly established that a departure from the usual custom and practice is evidence of negligence for the consideration of a jury. See *Custom as Standard of Care*, 68 A. L. R. 1400. As said by Mr. Justice Holmes in *Texas & Pac. R. Co. v. Behymer*, 189 U. S. 468, where a brakeman was thrown from the icy top of a car by a sudden and negligent stop:

> "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

The notion that respondent did not have notice of the presence of the ice and, therefore, was not guilty of negligence is equally a perversion of legal principles. An owner of premises is not entitled to receive actual knowledge of the acts of his employes as a foundation for liability in tort. As said in *Sears, Roebuck & Co.* v. *Peterson*, 76 F. (2d) 243:

> "But it is urged by defendant that there was no proof that defendant had knowledge of the presence of the twine upon the floor, or that it had been upon the floor for such a length of time as to charge it with constructive knowledge. This is not a case in which the condition was attributable either to the elements or the act of some third party. The negligence here complained of was that of the defendant itself, com-

mitted, it is true, by its employes. It would be an anomaly to hold that one is not to be charged with notice of a condition arising from his own active negligent act, or that there must be proof of knowledge or notice of a dangerous condition created by the negligent act or omission of the owner of the premises. It is universally held that the owner of the premises is charged with notice of any structural defects in his property, on the theory that one must be charged with notice of his own act, and, hence, *whenever defective conditions are due to the direct act of the defendant, or of persons whose acts are constructively his own, no notice need be shown, but is necessarily implied.*" (Italics ours.)

In the *Peterson* case, *supra*, where a piece of cord was lying in the aisle of a store but it did not appear how long it had been there, but it did appear by inference that some employe had probably left it there, the Circuit Court of Appeals said that under such circumstances, "Neither should the court indulge in mere speculation as to a possible defense unsupported by any proven facts."

It is respectfully submitted that the case at bar comes within the doctrine stated by Mr. Justice Butler in *Gunning* v. *Cooley*, 281 U. S. 90, that:

> "Where uncertainty as to the existence of negligence arises from a conflict in the testimony, or because, the facts being undisputed, fair minded men would honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

As said in *Railroad Co.* v. *Stout*, 17 Wallace 657, 663, concerning the inference of negligence which might be drawn from proven facts, "It is this class of cases

and those akin to it that the law commits to a decision of a jury."

Every element necessary to meet the definition of negligence adopted by the Restatement of the Law of Torts, Sections 289, 290 and 302(b), is present in the case at bar. Many of the authorities cited on assumption of risk and contributory negligence in the following subdivision of this brief are not only of helpful relevance, but are so closely in point as to be determinative of this issue, especially such cases as *York* v. *Chicago, M. & St. P. Ry. Co.*, 184 Wis. 110, 198 N. W. 377; *Melody* v. *Des Moines Union Ry. Co.*, 161 Ia. 695, 141 N. W. 438, on rehearing 145 N. W. 466; *Missouri Pac. R. Co.* v. *Boyd*, 194 Ark. 121, 106 S. W. (2d) 165; *Reams* v. *C. M. & St. P. R. Co.*, 180 Minn. 534, 231 N. W. 236; *Bell* v. *Terminal R. of St. L.*, 322 Mo. 886, 18 S. W. (2d) 40.

Specific reference will be made only to the *York* case, *supra*, where a brakeman slipped on the icy platform of a car, and in sustaining a recovery, the court said:

> "Where the condition, however, is not the result of natural causes, but is due to the acts of the defendant or its employes, a different situation arises. The conditions, however, may be the result of a combination of natural and artificial causes, and it appears that when such a combination exists and where the artificial cause is created by the acts of the defendant or its employes, a proper issue on the subject of negligence is raised."

The cases relied upon by respondent on this branch of the case, principally *Missouri Pac. R. Co.* v. *Aeby*, 275 U. S. 426 and *Hatton* v. *N. Y., N. H. & H. R. Co.*, 261 F. 667 (the latter being cited by the Appellate Court) involved ice resulting from natural causes and not from the act of the master's employes and, therefore, the courts properly held

that either actual or constructive notice was a necessary element of negligence. In the *Aeby* case the depression where the rain accumulated had existed for months with the knowledge of the plaintiff; the station agent, who was the only employe under a duty to inspect, report and to remedy the condition.

The mere existence of a strip of iron extending upwards upon a platform (*Northern Pac. Ry. Co.* v. *Berven*, 73 F. (2d) 687) or of oil thrown upon a stairway by adjoining machinery (*Jersey City Stockyards* v. *Grobner*, 5 F. (2d) 963) or of oil upon the deck of the tank and tender of an engine (*Rock Island* v. *Matthews*, 185 Ark. 724, 49 S. W. (2d) 392, Cert. den. 287 U. S. 640), or of oil and grease on the tank of a locomotive where it was not usual and customary for it to be there (*Gulf C. & S. F. Ry. Co.* v. *Crow*, (Tex.) 220 S. W. 237) or of grease on the running board of locomotive (*Crabtree* v. *Western Pac. R. Co.*, 33 Cal. App. (2d) 35, 90 Pac. (2d) 835) or of ice upon the apron between the tender and the cab of the locomotive (*Missouri Pac. R. Co.* v. *Boyd*, 194 Ark. 121, 106 S. W. (2d) 165), is sufficient to permit an inference of negligence where the circumstances render it probable that it resulted from the conduct of an employe. As said in *Missouri Pac. R. Co.* v. *Boyd*, *supra*:

> "If, as the jury has found, there was ice on the steps and apron, how did it get there, if not by the act of the brakeman in wetting down the coal?"

If, as the jury found, there was no crack or leak in the case at bar, then how did the ice, which the jury found was present on the tender, get there if not by the act of the hostler in negligently permitting an overflow when he filled the tank?

In *Crabtree* v. *Western Pac. R. Co.*, 33 Cal. App. (2d) 35, 90 P. (2d) 835, where plaintiff slipped on some grease, it

was said, "In the present action the plaintiff established a prima facie case of negligence on the part of some co-employe in leaving a lump of grease on the running board. It was not necessary for him to prove just who dropped that grease upon the board." The Court said that in view of the duty to wipe off grease and leave the running board clean, identical with the duty here under Rule 153 and under the usual practice to keep water off the tank, its presence made a prima facie case of negligence.

C.

The petitioner did not assume the risk as a matter of law.

1. The issues of contributory negligence and assumption of risk were properly submitted to the jury.

Historically the doctrine of assumed risk arose before the industrial revolution and at a time when the servant and the master worked side by side at a common bench. Business operations were of a simple nature. The servant performed but simple tasks with simple tools and his fellow servants, few in number, were close and well known to him and the master. Out of this situation arose the defense based on *Volenti non fit injuria.* As said by Bowen, L. J., in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, 696:

> "The maxim, be it observed, is not *'scienti' non fit injuria,* but *'volenti.'* It is plain that mere knowledge may not be a conclusive defense."

Later in *Yarmouth* v. *France*, 19 Q. B. D. 647, the *Thomas* decision was carefully analyzed and it was said:

> "Taking the whole of that judgment together, it seems to me to amount to this: that mere knowledge

of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim *Volenti non fit injuria*. If so, that is a question of fact."

The seal of condemnation was placed upon the entire doctrine and its last vestiges were abolished in England by an Act of Parliament passed August 6th, 1897 (vide St. 60 and 61, Vict. c. 37, Chitty's English Statutes, Supplement 1895-1901, vol. 14). Why this anachronism has persisted in the jurisprudence of this country when it is so wholly unsuited to our complex and hierarchical organization of business is a mystery. It has never been a favored doctrine in this Court, which has regarded it as artificial and harsh and as an affirmative defense the burden to establish which is upon the master.

Kanawaha & M. R. Co. v. *Kerse*, 239 U. S. 576.
Tex. & Pac. R. Co. v. *Archibald*, 170 U. S. 665.
C. R. I. & P. Ry. Co. v. *Ward*, 252 U. S. 18.
Chesapeake & O. R. Co. v. *Proffit*, 241 U. S. 462.
39 C. J., sec. 891, p. 689.

There are two kinds of risks: 1, ordinary risks, and, 2, extraordinary risks arising from negligence. Those in the latter classification are usually not assumed, and the courts are reluctant to sustain this defense when risks in the second category due to negligence are involved. Has respondent met the burden so conclusively that reasonable minds cannot disagree? Petitioner did not know that the ice was there until he got around in front of the manhole nor until "after I got into the ice" (R. 55). He picked up the pole and knocked off the ice and braced himself "good" and got hold of the spout and pulled it part way around, without slipping (R. 13, 55).

Here it was not solely the fact that petitioner slipped upon the ice that caused the accident; there was also the element that the pole and hook slipped on the water spout; both were causative factors (R. 13, 55). There is no evidence that the hook was certain to slip or even likely to slip. There was no evidence that petitioner knew that the hook would slip. There was no evidence that he did not justifiably believe that the hook would remain upon the water spout and that with his feet astride and properly braced, he could succeed safely in filling the tender with water (R. 13, 55). The burden to adduce evidence to show full appreciation and voluntary assent was upon respondent, not petitioner. In the absence of evidence, inferences should be drawn in favor of petitioner, not respondent, and the court should not resort to speculation.

As said in *Chicago & E. R. Co.* v. *Ponn*, 191 F. 682, 687, "The subjects of assumption of risk and contributory negligence are much confused in many of the decisions. They are entirely distinct. One has to do with contract, and the other rests in tort." See also *Atlas Portland Cement Co.* v. *Hagen*, 233 F. 24.

Of particular interest here is *Schlemmer* v. *Buffalo R. & P. R. Co.*, 205 U. S. 1, where Justice Holmes warned that where one is a complete defense and the other is not, the distinction between contributory negligence and assumption of risk should be carefully observed. He called attention to the fact that men who work with their hands do not have the freedom and equality of position assumed by laissez faire, that the doctrine of contract was rather shadowy as applied to this defense, and that distinguishing it from contributory negligence

> "* * * the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous

employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

Following this admonition it was said in *Cross* v. *C. B. & Q. R. Co.*, 191 Mo. App. 202, 186 S. W. 1130, that great care should be exercised "lest the plaintiff's rights be sacrificed entirely by calling his act assumption of risk, when, strictly speaking, it is only contributory negligence, which does not defeat his cause of action entirely but merely reduces his damages."

Judge Dennison, concurring in *Cincinnati N. O. & T. P. Ry. Co.* v. *Thompson*, (6 Cir.) 236 F. 1, 16, interpreted the *Schlemmer* case to mean "That when Congress by this statute greatly broadened plaintiff's right to recover, preserving only one bar out of the three existing, the defendant must bring its case clearly within the bar so preserved; and that plaintiff's conduct should not be treated as assumption of risk, and so be allowed to defeat the action unless it can be clearly and distinctly so classified."

Where a pedestrian knowingly walks upon an icy sidewalk, or where an invitee walks upon icy or slippery premises, his conduct is universally denominated contributory negligence in its legal significance. It is not assumption of risk. The authorities are collated and discussed in 13 A. L. R. 73, "Contributory Negligence in Falling on Slippery Walk." This is also the rule of the Federal

Courts, *Great Atlantic & Pac. Tea Co.* v. *Chapman*, (6 Cir.) 72 F. (2d) 113; *Phillips Petroleum Co.* v. *Childress*, (10 Cir.) 78 F. (2d) 861; *Lord Baltimore Filling Stations* v. *Miller*, (Ct. of App., D. C.) 110 F. (2d) 698.

A juridical standard should not be a respecter of persons. Judicial action must indeed be blind if it holds the conduct of Norvel H. Lilly in walking or standing on ice to be an assumption of risk while he is on duty for respondent as an employe, but classifies essentially the same conduct as contributory negligence simply because there is a slight difference in chronology and geography.

Authorities Directly in Point or Closely Analogous.

In *Fitzgerald* v. *Conn. River Paper Co.*, 155 Mass. 155, 29 N. E. 464, and *Mahoney* v. *Dore*, 155 Mass. 513, 30 N. E. 366, a servant knowingly walked down icy steps while holding to a railing with one hand, and it was held that assumption of risk was a question of fact for the jury. In the latter case it was said that even though a servant knows and appreciates the risk, it was a question of fact, "whether she assumed it voluntarily, or because she felt obliged to continue in the service, and make the best of the situation in which she found herself." It was held that if the employe acts under a call of duty or an exigency or constraint of any kind, the act is deprived of its voluntary character.

In *Mason & O. R. Co.* v. *Yockey*, (6 Cir.) 103 F. 265, where water was escaping and being thrown from the tender because of an imperfectly fitting plug, and the water fell and created an icy covering on the apron between the engine and tender, the Court held it was for the jury to say whether he assumed the risk because the firemen continued to work after he became aware of the escaping water and because he fell on the ice. It was said,

"We do not think there was anything in the circumstances which required the defendant in error to suddenly abandon the service of the company. At least, this duty was not so self-evident as to require the question to be taken from the jury."

Where in order to determine whether the hazard is great and immediate the employe must form opinions and draw conclusions, the question is for the jury. So where the brakeman who was injured when in alighting he stepped on a large piece of slag knew that there were smaller pieces along the roadbed but did not know that there were large ones, a recovery was sustained in *Cincinnati, N. O. & T. P. Ry. Co.* v. *Thompson*, (6 Cir.) 236 F. 1.

To the same effect is *Erie R. Co.* v. *Regan*, (2 Cir.) 297 F. 435, involving snow, and *New York, N. H. & H. R. Co.* v. *Branstretter*, (2 Cir.) 200 F. 255, involving an icy running board.

In *Chicago, R. I. & P. Ry. Co.* v. *King*, 165 Okla. 169, 25 P. (2d) 304, where the deceased stepped on a roughened and uneven ledge of steel upon the tender and fell to the ground, there is a lengthy discussion of the distinction between assumption of risk and contributory negligence. In holding assumed risk was for the jury it was said, "The deceased was not required to keep his mind constantly on the ragged piece of steel even though he may have known of same, in the performance of his duties."

It was held that assumption of risk was for the jury in the following cases: In *Bell* v. *Terminal R. of St. L.*, 322 Mo. 886, 18 S. W. (2d) 40, where a fireman slipped when he knowingly used the icy steps of his engine in alighting; in *Missouri Pac. R. Co.* v. *Boyd*, 194 Ark. 121, 106 S. W. (2d) 165, where a fireman slipped on ice on the apron between the cab and the tender; in *York* v. *Chicago, M. & St. P. Ry. Co.*, 184 Wis. 110, 198 N. W. 377, where a

brakeman slipped from the icy platform of a car but had no knowledge of its condition before boarding it and was engrossed in his duties thereafter; in *Reams* v. *Chicago M. St. P. & P. R. Co.*, 180 Minn. 534, 231 N. W. 236, where a conductor slipped on an icy platform while alighting from the caboose; in *Hardin* v. *Ry. Transfer Co.*, 80 Minn. 504, 83 N. W. 395, where a switch foreman was using some icy steps and even admitted on cross-examination that he had as good an opportunity as anybody to know whether there was ice on them; in *Melody* v. *Des Moines Union Ry. Co.*, 161 Ia. 695, 141 N. W. 438, where a brakeman slipped on a ridge of snow and ice alongside the tracks with one foot while his other foot slipped on ice on a footboard as he was getting on his engine; in *Pitcairn* v. *Hunault*, (7 Cir.) 86 F. (2d) 664, where an employe tripped on a coil spring between the tracks; in *Northern Pac. Ry. Co.* v. *Berven*, (9 Cir.) 73 F. (2d) 687, where a piece of iron had curled up on a platform and was in plain sight and an employe tripped on it; in *McCarthy* v. *Palmer*, (2 Cir.) 113 F. (2d) 721, where a brakeman tripped over a burlap bag on a caboose platform which rendered it defective and the employe knew it was there; and in *Gulf, C. & S. F. Ry. Co.* v. *Crow*, (Tex.) 220 S. W. 237, where a fireman slipped on oil and grease and fell from the tank of a locomotive and the evidence showed it was not usual and customary to find it there.

It is impossible to reconcile the decision below with that of this Court in *Keys* v. *Pennsylvania R. Co.*, 308 U. S. 529, reversing the case of *Keys* v. *Pennsylvania R. Co.*, 104 F. (2d) 663, and holding that assumption of risk was for the jury. We earnestly request the members of this Court to read the opinion which was set aside and disapproved by the reversal in the *Keys* case. It would be a strange system of jurisprudence which would award a jury trial in that case and deny one here.

In *Leonidas* v. *Great Northern Ry. Co.*, 30 Mont. 446, 76 P. (2d) 1007, where an employe was carrying a tie over rough ground and up an embankment, and he stepped on a rock and turned his ankle, falling and injuring his back, this Court held that assumption of risk was for the jury without discussion. *Great Northern Ry. Co.* v. *Leonidas*, 305 U. S. 1.

Analysis and Critique of the Opinion Below.

Upon the trial the respondent called about twelve or more witnesses, all of whom were men of long railroad experience. None of them testified to any facts indicating any impropriety in petitioner's conduct; none of them testified to any custom or practice which he violated or departed from. Respondent itself made no such contention in the court below. Without any evidence to that effect, the lower court gratuitously assumed that in order to relieve himself from the charge of assumed risk the petitioner could and should have made the tender safe with sand or ashes (R. 137). Apparently the members did not know that sand is kept in the dome on top of the engine and practically inaccessible. Apparently the court did not know that all of the sanders operate simultaneously and that while petitioner was down on his knees holding a shovel under one sander, sand would be flowing from the other onto the rails (piled up sand can even cause a derailment); and no doubt the Court was unfamiliar with the fact that this sand is specially prepared and specially dried and is of a character so that engineers are reluctant to permit its use for other purposes. Apparently the Court did not know that whether ashes are available depends upon the condition of the fire and that it is a difficult task to obtain ashes with the fireman's shovel. In fact, after borrowing the shovel, petitioner would have to go through a dangerous proceeding to carry ashes mixed with hot coals

to the top of the tender by either climbing up the ladder or climbing over the coal, and the operation would require the cooperation of two or more crew members.

Apparently the Appellate Court required Lilly to perform the duty of the Master to make the tender safe.

It is obvious that the members of the Appellate Court themselves were utterly unfamiliar with either procedure which they recommended, and had any of them ever attempted to obtain sand from the dome or ashes from the firebox of a locomotive, the juridical result below might have been different. Apparently the members of the Appellate Court were also unfamiliar with the thoroughly established and universally acknowledged rule of law that the failure of the petitioner to select the safer of two courses would be contributory negligence and not assumption of risk.

FEDERAL CASES.

Anzolotti v. *McAdoo*, 262 F. 568.

Thomson v. *Boles*, (8 Cir.) 123 F. (2d) 487.

Terminal R. Ass'n. of St. L. v. *Farris*, (8 Cir.) 69 F. (2d) 779.

Norfolk & W. R. Co. v. *Riggs*, (6 Cir.) 98 F. (2d) 612.

Rocco v. *Lehigh Valley R. Co.*, 228 U. S. 275.

STATE CASES.

Louisville v. *Morrill*, 211 Ala. 39, 99 So. 297, Cert. den. 265 U. S. 582.

Virginia & Portland Cement Co. v. *Swisher's Admr.*, 122 Va. 123; 94 S. E. 159.

St. Louis, I. N. S. R. Co. v. *Yates*, 257 Mo. 593; 166 S. W. 282.

Houlihan v. *Conn. River Co.*, 164 Mass. 555; 42 N. E. 108.

Sinclair Oil & Gas Co. v. *Langley*, 146 Okla. 160; 293 S. W. 1014.

Headrick v. *H. D. Williams Cooperage Co.*, 97 Ark. 553; 134 S. W. 957.

Chicago, R. I. & P. Ry. Co. v. *King*, 165 Okla. 169; 25 P. (2d) 304.

In *Anzolotti* v. *McAdoo*, *supra*, Judge Learned Hand noted the necessity for careful discrimination between the two defenses under the *Schlemmer* decision and said:

> "At any rate, without attempting any exhaustive definition, it appears to me quite safe to say that when the injury arises from a failure to choose correctly between two ways of discharging those duties, one of which is safe and the other hazardous, the servant has not assumed the risk, but has negligently contributed to the injury."

In *Thomson* v. *Boles*, *supra*, where the authorities are cited, the Circuit Court of Appeals of the Eighth Circuit said:

> "Moreover, the departure, if any, from the usual and customary practice would not be a complete defense, but would merely constitute contributory negligence."

In *Louisville* v. *Morrill*, *supra*, the Alabama court said:

> "If there are two ways in which an act can be done—one a safe way, the other a dangerous way—and the person who has to do the act chooses the dangerous way with knowledge of the danger, he is guilty of contributory negligence and not assumption of risk."

All of the authorities cited by respondent or relied upon by the Appellate Court are distinguishable in that they fall within one of three classes:

1. Where no negligence was shown.
2. Where the condition was of a permanent nature and resulted from natural causes.
3. Where the danger of injury was certain and immediate and practically unavoidable.

A decision that there can be no recovery where there is no negligence at all and where the ice was formed from natural causes, as in *Missouri, Pac. R. Co.* v. *Aeby*, 275 U. S. 426, and *Hatton* v. *New York N. H. & H. R. Co.*, 261 F. 667, is not at all a precedent for holding that petitioner in the case at bar assumed the risk from ice negligently created by affirmative conduct. In the *Aeby* case this Court said that absent negligence, "We need not consider its contentions in respect of assumption of risk * * *."

The other cases cited in the opinion below, namely, *Seaboard Airline* v. *Horton*, 233 U. S. 492, *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, and *Boldt* v. *Pennsylvania R. Co.*, 245 U. S. 441, all concerned the propriety of requested instructions, *and in none of them was it held that assumption of risk appeared as a matter of law.* In two of them the verdict of the jury was actually sustained and in the other case a reversal resulted from erroneous instructions. A mere reading of the opinions will disclose that none is authority here on the facts.

Petitioner Was Entitled to an Opportunity for Deliberation, Choice and Assent.

The authorities hereafter cited and discussed indicate that a railroad employe circumstanced as petitioner is entitled to an opportunity to complain to the Master of the dangerous condition before being confronted with the alternative of abandoning the service. Confronted with the situation, petitioner might have attempted to make the

place safe or to do the work in a different manner, for example, without standing on the ice. His failure to select a different course from that actually pursued would amount only to contributory negligence. Failing that, he is not required immediately to walk off the engine and abandon the service. In fact, his duty to his employer and to the public is otherwise. Because as said in 3 Labatt, Master and Servant, (2d Ed.) Sec. 1216, p. 3303, "The case of a railway servant stands upon a special footing as he is deemed to owe a duty to the public as well as his employers, and the effect of the decision, as a whole, is that he is justified in taking much greater risks than employes in other occupations, without necessarily forfeiting his right of action. Under ordinary circumstances, such a servant seems to be, at all events, entitled to remain at work until he obtains an opportunity to notify the proper agent of the master as to the existence of the danger."

In *C., N. O. & T. P. Ry. Co.* v. *Thompson*, (6 Cir.) 236 F. 1, it was said:

> "The sole basis thereof is knowledge of the risk at the time of entering into the employment or obtained subsequently under such circumstances that there is freedom of choice as to remaining in the employment before incurring it."

In *Kane* v. *Northern Central Ry. Co.*, 128 U. S. 91, with respect to the conduct of a brakeman who remained in service with knowledge that a step was missing from one of the cars, "An employe upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, not to abandon his post unnecessarily."

The question was held to be for the jury in *Southern Pac. R. Co.* v. *Yeargin*, 109 F. 436, Cert. den. 183 U. S. 695, where the Court said:

"Whether he acted with ordinary prudence in remaining in the defendant's service with the knowledge which he had acquired of the insufficient equipment of the helper engines, is the true test by which to determine whether he assumed the particular risk, and released the railroad company from liability for the nonperformance of the duty to supply proper equipment which the law devolved upon it."

Before *Volenti non fit injuria* should constitute a defense there must be an opportunity for the servant to decide whether or not to go on with the work and there must be time for real deliberation and an estimate of the comparative advantages and disadvantages. 3 Labatt, Master and Servant, (2d Ed.) Sec. 1304, p. 3660. Assumption of risk being contractual implies choice and freedom of consent, and before choice can be implied, there must be an opportunity to choose. *Louisville & N. R. Co.* v. *Dobbs*, 38 Ga. App. 239, 143 S. E. 601. As said in *Olney* v. *Boston & M. Ry. Co.*, 71 N. H. 427, 52 A. 1097:

"Continuance in service with knowledge of the risk is generally conclusive evidence of the servant's agreement to assume it. *Collins* v. *Carr Co.*, 68 N. H. 196, 38 A. 1047. When, after discovery of the defect, the servant has no opportunity to leave the service before the injury is received, there is no ground for the legal implication of such a contract. *Casey* v. *Ry. Co.*, 68 N. H. 162, 44 A. 92, *Dempsey* v. *Sawyer*, 95 Me. 295, 49 A. 1035. The voluntary assent of the servant is essential to the contract."

The applicable principle is stated in 1 Shearman and Redfield, Negligence, 6 Ed., Sec. 211, as follows:

"The true rule, as nearly as it can be stated, is that a servant can recover for an injury suffered from

defects due to the master's fault, of which he had notice, if, under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similar conditions, have been justified in continuing the same work under the same risk; but not otherwise. * * * If every servant on a railroad or in a factory should refuse to work by the side of a negligent fellow servant or with defective materials, immediately upon becoming aware of the fact such enterprises could never be carried on. Obviously, a reasonable time must be given for removal of the defect, and meantime, the business must be carried on with no prejudice to the servant's rights, unless the risk is so great that no one, acting with ordinary prudence would go on under the circumstances."

Everyone from time to time has occasion to walk upon icy sidewalks or the icy steps of his home, sometimes carefully and sometimes carelessly, but it is seldom that anyone absolutely refuses to walk over an icy area to accomplish his object. Prudence or negligence in doing so should be considered an issue of fact for the jury, especially where; as here, the conduct of a railroad trainman on duty is under judicial scrutiny.

The applicable rule is well stated in White on "Personal Injuries on Railroads," Volume 1, p. 377, that knowledge of the defect and failure to complain will not always work an assumption of risk "for the employe may have had reasonable ground to believe by the exercise of due care on his part that he could use the defective appliance without a resulting injury."

The following facts in the case at bar fully justified the trial Court in submitting the case to the jury:

1. The condition was not *necessarily* dangerous nor certain to result in injury.

2. Petitioner's knowledge was so closely connected in point of time and action that there was no appreciable interval.

3. Petitioner had no opportunity to object to the master.

4. There was no evidence that petitioner freely and voluntarily consented to the condition.

5. The petitioner was under a duty not to delay the train and hence not to abandon that one, single task.

6. The unexpected release of the hook from the water spout acted in conjunction with the ice under his feet to cause the accident.

A realistic view constrains us to believe that had petitioner sought out the engineer or conductor to make a complaint, he would have been peremptorily admonished (probably with a generous admixture of profanity) to return to his task and to perform his duties with dispatch so that the train could leave at the appointed time.

Petitioner was not asked why he did not abandon the job and make a complaint, or whether he intended to do so upon filling the tank with water, or whether he continued with the work and completed the task in order to enable the train to depart on schedule, or whether the believed he could pull the spout over and into the manhole without slipping, or whether he acted under some exigency or constraint of some kind. The silence of the Record on these points militates against the party having the onus on this issue, that is, the respondent.

D.

Assumed risk not available to defendant.

2. The amendment of 1939 was retroactive and the defense of assumed risk was not available.

We have demonstrated in the preceding subdivision of this brief that even were the defense of assumed risk available to respondent, it was properly submitted to the jury along with the issue of contributory negligence, and the evidence abundantly sustains the verdict. Therefore, whether the amendment be retroactive or not, the decision of the jury has foreclosed the issue in favor of petitioner.

But the Federal Employers' Liability Act (April 22, 1908, c. 149, Sec. 1; 35 Stat. 65) provided that, "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The words "shall be liable" imported an absolute liability where there was negligence, without the defense of contributory negligence or assumption of risk. However, the courts by way of interpretation retained the old defense of assumption of risk and in order to make its original intention clear, Congress by an amendment effective August 11th, 1939 (45 U. S. C. A. 54, Cumulative Pocket Part) provided:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this

chapter to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where *such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employes of such carrier; and no employe shall be held to have assumed the risks of his employment in any case where* the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe." (Amended part in italics:)

It should be noted that in the original Employers' Liability Act Congress in Sec. 3 thereof provided that contributory negligence should not bar a recovery but should only diminish damages. The original Act was silent with reference to assumption of risk. Because the courts by a sort of judicial atavism retained the common law defense of assumption of risk, it became necessary for Congress by the amendment to make clear its original intent. The amendment, of course, has now become a part of the original Act.

Reference was recently made by Mr. Justice Jackson in *Miles* v. *Ill. Cent. R. Co.*, 62 S. Ct. 827, to the "medieval system" of compensating railroad employes, and one of the relics of this feudal and "backward" system was the ancient and barbarous doctrine of assumption of risk now happily abolished in all cases. Presumably when Congress acted to eliminate this defense, it did so with the purpose of promoting justice in all cases to which its power would extend. The cruelty of the defense had been the subject of much comment by judges, sociologists and law writers generally. The action of Congress was remedial; the legislation cannot be otherwise classified; and no good reason appears why the benefits of a wise and human amendment

should be unnecessarily restricted, but on the contrary it should received a liberal interpretation to effectuate its object and purpose. Essentially the question is one of ascertainment of the Congressional intent.

This amendment became effective while this case was pending on appeal in the Appellate Court (R. 9). The section refers not to accidents or causes of action but to actions "brought" against common carriers. The language is, "That in any action brought * * *." Brought is in the past tense, and Congress did not limit the section to actions "to be brought," or "to be commenced," nor to "actions arising hereafter," etc.

That retrospective operation was intended by Congress is evidenced by the fact that Section 3 of the original Federal Employers' Liability Act (April 22, 1908, c. 149, Sec. 3; 35 Stat. 66) provides; "In all actions hereafter brought * * *."

Where the words employed were "shall arise" and "shall be commenced," it was held in *Link* v. *Receivers of Seaboard Airline Ry. Co.*, (4 Cir.) 73 F. (2d) 149, that, "The use of the future tense in these two vital sections effectually negatives any suggestion that the section was intended to apply retroactively." By the same reasoning the use of the past tense in the word "brought" indicates retrospective operation.

In *Hine* v. *Belden*, 29 Conn. 384, it was held that the use of the word "brought" "implies past time, and includes prosecutions pending as well as those thereafter to be brought."

The Court below erroneously decided that the defense of assumed risk was a vested right (R. 139) and, therefore, could not be eliminated by retroactive legislation. This resulted from a misapprehension as to the true rule estab-

lished by the decisions of this Court which held in *Arizona Copper Co.* v. *Hammer*, 250 U. S. 400:

> "No person has a vested right, entitling him to have unchanged the existing rules of law concerning an employer's responsibility for personal injury or death of an employe."

In the *Arizona* case, this Court had under consideration a state statute making employers liable for accidental injury to servants not themselves negligent which deprived the master of all common law defenses such as assumed risk and contributory negligence. The question here is not one of legislative power because no person can acquire a vested right in the rules of the common law except with respect to property. The distinction between a defense which is a vested right and one which is not was foreshadowed in *Campbell* v. *Holt*, 115 U. S. 620, involving a legislative act which in effect revived a cause of action and the Court said:

> "It is much insisted that this right to defense is a vested right, and a right of property which is protected by the provisions of the fourteenth amendment. It is to be observed that the words 'vested right' are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. • • •
>
> "We are unable to see how a man can be said to have *property* in the bar of the statute as a defense to his promise to pay. In the most liberal extension of the use of the word 'property' to choses in action, to incorporeal rights, it is new to call the defense of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law."

Paraphrasing this language, the defense of assumed risk is not property; it is no natural right; it is the creation of conventional law. That a defense like contributory negligence may be abolished by constitutional or legislative action, see also *C. R. I. & P. R. Co.* v. *Cole*, 251 U. S. 54, following the Arizona employers' liability case.

While not otherwise in point, the language of *Levy* v. *Birnschein*, 206 Wis. 486, 240 N. W. 140, is pertinent:

> "'Legislative acts remedial in their nature are frequently construed so as to act retrospectively and amendments to existing laws to strengthen legislative effort to correct abuses are to be so applied and construed as to suppress the mischief and advance the remedy."

A remedial statute is usually defined as one for the redress of grievances or which grants a remedy for the protection of rights. Under universal rules they are liberally construed and will be given a retrospective operation whenever such seems to have been the intention of the legislature. Lewis Sutherland, Statutory Construction, Vol. 2, p. 1227, states that, "General words in remedial statutes may be applied to past transactions and pending cases according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice." See, also, Cooley, Principles of Constitutional Law, 3d Ed., p. 360-1, where the author states:

> "The citizen has no vested right to any particular remedy, and the state may therefore take away at discretion those it provides and substitute others which shall apply to wrongs already committed as well as those which may thereafter be committed."

The fact that the action had already been commenced is immaterial because as said in *McGuire* v. *Cunningham*, 80

Cal. 553, 22 P. 839, "It has been held in a number of cases that statutes affecting procedure or allowing a new remedy for enforcing existing rights are justly and properly applicable to actions pending when such statutes became effective." Nor does the fact that an appeal was pending prevent the application of the amended law. In the opinion of Justice Reed in *Vandenbark* v. *Owens-Ill. Glass Co.*, 311 U. S. 538, the language of Chief Justice Marshall was quoted with approval that:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

The judgment, herein, of course, had not become final and, therefore, the language of *Wall* v. *Chesapeake & O. Ry. Co.*, 290 Ill. 227, 125 N. E. 20, is applicable that:

> "If a case is appealed and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered. * * * This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to pronounce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court had been withdrawn by an absolute repeal."

See also *U. S.* v. *Schooner Peggy*, 1 Cranch 103; *South Carolina* v. *Gaillard*, 101 U. S. 433; *Ewell* v. *Daggs*, 108

U. S. 143; *Railroad* v. *Grant*, 98 U. S. 398; *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23.

The state authorities holding that remedial legislation of various types may and should be given a liberal, retrospective operation are too numerous to discuss or quote from in this brief. A few scattered citations will suffice:

Dehan v. *Hotel & Restaurant Employes, etc.*, (La. App.) 159 So. 637.

DeMarse v. *Bruckman*, 298 N. Y. S. 736.

Bruton et ux v. *Tex. Power & Light Co.*, (Tex. Civ. App.) 44 S. W. (2d) 462.

Hoffman v. *Hoffman*, 26 Ala. 545.

Masedo v. *Masedo*, 29 Cal. App. 552, 84 P. (2d) 552.

Rossville Commercial Alcohol Corp. v. *Dennis Sheean Transfer Co.*, 18 La. App. 725, 138 So. 183.

Bartley v. *Boston, etc. Ry.*, 198 Mass. 163, 83 N. E. 1093.

VII.

CONCLUSION.

Nothing occurred upon the trial of this cause to arouse any passion or prejudice. The defendant, represented by able and experienced counsel, had the opportunity of presenting all of its arguments and evidence to the court and jury. The trial judge presided with dignity and impartiality. Under such circumstances the American jury system operates at its best, and especially at a time like the present, quotations from our courts concerning the object and purpose of a jury trial can well bear frequent repetition. The issues in the case at bar were of a character to per-

mit a just and intelligent decision by a jury composed of men operating or working in banks, factories, stores and business establishments, who certainly have had at least as much and probably a great deal more experience with the problems presented by ice upon their premises than the most wise and learned jurists.

Concerning the American jury system, it has been said:

1873

"Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain." *R. R. Company* v. *Stout*, 17 Wallace 657, 663.

1894

"We are constrained to hold that the provision of our Constitution, which gives parties to an action at law a right to a trial by jury, embraces even parties who bring actions at law against railroad corporations, and that the persistent effort to push precedents to the point of requiring trial judges to decide as questions of law the issues most commonly joined in cases where recovery for personal injuries is sought should not be encouraged." *New Orleans & N. E. R. Co.* v. *Thomas* (5th Cir.), 60 F. 379.

1942

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of

Federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob* v. *City of New York*, 62 S. Ct. 854.

Respectfully submitted,

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DEC 4

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 124

NORVEL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Mindful of the applicable rule, we shall confine attention solely to certain erroneous and misleading statements in respondent's brief. The studied effort to convey the impression by quoting carefully selected excerpts from the evidence and the court's charge that "only one issue was tried" needs especially to be exposed.

Respondent's present attempt to make it appear that the sole issue tried was whether a crack existed in the tender is unworthy. In pleading, in proof, and in the court's charge this case was tried on the theory that defendant might be liable if its negligence or if its violation of the Safety Appliance Act in *either* of the respects alleged in Paragraphs 4d or 4e of the complaint caused the accident. In submitting the Safety Appliance Act to the jury nowhere did the trial court restrict or confine its instruction exclusively to the

existence or non-existence of the crack or leak—in nowise was the jury charged that a finding of a violation of the Safety Appliance Act would have to be predicated solely upon such a defect. The special interrogatory submitted at respondent's request contained no such limitation.

Significantly, respondent in quoting from the court's charge has omitted any reference to the following portions:

1. Wherein the court advised the jury that the action was brought under both the Federal Employers' Liability Act and the Safety Appliance Act, reading the latter verbatim (R. 116, 7).

2. Wherein the court instructed the jury, "You are further instructed that under the law the defendant was bound to furnish to the plaintiff a locomotive, at the time in question, which was safe to be used, and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk" (R. 119).

3. Wherein the court advised the jury that one of the charges in plaintiff's complaint was that defendant required him, "on this occasion to work on the engine tank when this engine tank was unsafe and dangerous because defendant negligently allowed, caused and permitted ice to accumulate and be on the engine tank at the place where it required plaintiff to work; and that thereby, plaintiff was so at work, * * *" (R. 118).

4. Wherein the trial court instructed the jury that assumed risk was not available if defendant violated the Safety Appliance Act and instructed the jury that it would not prevent plaintiff from recovering if under the law and the evidence they found a violation of the Safety Appliance Act as charged in plaintiff's complaint (R. 120).

5. Wherein the court instructed the jury that "in the

event you find the defendant did not violate any Safety Appliance Act, but that you do find under the evidence and instructions of the Court, that defendant was guilty of one of the other charges of negligence alleged in plaintiff's complaint, and further find that plaintiff was guilty of negligence contributing to his injury in this case, then plaintiff's contributory negligence does not bar him from recovering in this action but will affect any damages he is entitled to recover * * *" (R. 120).

6. Wherein the court at the request of respondent instructed the jury:

"The Court instructs the jury that one of the charges of negligence against the defendant was that it negligently permitted ice to be and remain upon the deck of the tender. If you find from all the evidence under the instructions of the Court that the plaintiff was guilty of negligence which contributed to cause his injuries and that the injuries were sustained as a result of the defendant negligently permitting said ice to be and remain upon the deck of the tender and not because of any crack or leak in the tender, and if you further find that the defendant was guilty of negligence which contributed with the negligence of the plaintiff to cause his injuries, then it is your duty to diminish the amount * * *" (R. 124).

7. Wherein the court instructed the jury:

"You are further instructed that if you believe from a preponderance of the evidence, under the instructions of the Court, that the defendant was guilty of negligence and unlawful conduct in any of the charges made in plaintiff's complaint, and that as a direct and proximate result and in consequence thereof plaintiff sustained injuries, as charged by the plaintiff, and that plaintiff did not assume the risk of his employment, then you should find the defendant guilty, provided, however, that if you find, from a preponderance of the evidence and under the instructions of this Court, that the defendant is guilty of a violation of a Safety Appliance Act,

as charged in plaintiff's complaint, then assumption of risk is no defense" (R. 120).

Counsel ask on Page 21 why Paragraph 4 (c) was not more specific if it intended to charge a violation of the Safety Appliance Act. The answer to the query is that Paragraph 4 (d) of the complaint raises the issue as to the effect of ice as a violation of the Safety Appliance Act, and the trial court submitted this issue by instructing the jury that compliance with the law required a tender "which was safe to be used and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk" (R. 119).

I.

The Application of a Controlling Rule of Law Overlooked by an Inferior Court Does Not Involve a Change of Theory.

Petitioner's theory of the trial, in addition to a claim of general negligence, was that the Safety Appliance Act had been violated in two respects. The jury had a perfect right to adopt plaintiff's theory and to find that the Safety Appliance Act had been violated in the respect not involved in the special interrogatory. From the general verdict it is apparent that the jury may have properly so found.

If a case be pleaded and proved under the Safety Appliance Act, then whether the statute be referred to *co nomine* is immaterial. For the purpose of this case Rule 153 of the Interstate Commerce Commission is a part of the statute. The rule is just as binding and controlling on a lower court as a decision of this court construing a Federal statute.

This Honorable Court has laid down the rule that where no express claim was made under an Act of Congress (Federal Employers' Liability Act), but where facts were

expressly alleged and proof clearly established that the injury complained of was governed by the Federal statute, then the Federal Act controls, even though not urged at the trial. *Grank Trunk Western Ry. vs. Lindsay*, 233 U. S. 42, 34 S. Ct. 581.

That it is not necessary to refer to either the Safety Appliance Act or the Employers' Liability Act, or that even though the pleader mistakenly alleges a case under the State Act, this is immaterial and the court is presumed to be cognizant of the Federal statutes and to apply them was held in *Norfolk & W. Ry. Co. vs. Hall*, 49 F. (2d) 692, and *Hines vs. Smith*, 275 F. 766.

See also *Central Vermont Ry. Co. vs. White*, 238 U. S. 507, 35 S. Ct. 865.

We recognize the well-settled rule that a party who has invited error and who has induced the court to commit it cannot later complain. We also recognize the equally elementary rule that a party cannot submit his case on one theory and "ask for a reversal upon another and inconsistent theory," as in *Snyder vs. Snyder*, 142 Ill. 60. Nor do we question the universal proposition that parties who litigate by consent issues not made by the pleadings are bound by the determination (which principle, if applicable at all, militates against respondent here), as in *San Juan Light Company vs. Requena*, 224 U. S. 89, and *M-K-T Ry. Co. vs. Wilhoit*, 160 F. 440. The instant case does not come within either of the above categories; there has been no change or departure, no invited error, no submission of extraneous issues. Petitioner's counsel and the Appellate Court had simply overlooked an applicable rule of law which confirmed, fortified, and required that the result reached by the jury and the trial court be sustained.

It is argued that because petitioner's counsel mistakenly

and foolishly argued to the jury that a negative answer to the special interrogatory would put his client out of court, that petitioner and the court are forever conclusively bound by this expression of opinion. The argument of petitioner's counsel is not reported in full. The portion wherein petitioner's counsel argued liability on other bases has been omitted, but irrespective of this feature of the case, the jury were instructed at respondent's request that they must accept the law from the court's instructions (R. 125), not from the argument of counsel.

II.

The Doctrine of the Ford Case Has No Application Under Rule 153.

The authorities relied upon by the respondent such as the *Reeves*, *Slater*, *Benson*, *Harlan*, and *Riley* cases are distinguishable for two reasons:

First, in such cases there was no claim of liability based on non-compliance with a standard set up by rule of the Interstate Commerce Commission.

Second, the case at bar is not one where the ice resulted "accidentally from some unforeseen cause," but where as found by the trial court it was negligently deposited on the tender nor is it a case where "a brakeman slips upon a running board coated with ice during a sleet storm."

III.

The Weight and Credibility of Testimony Was for the Jury.

The court will receive no help from reckless rhetoric nor from epithets, and the inconsistency of respondent's argument should not be obscured by this strategy. Petitioner, who is made the target of severe strictures in respondent's brief, might well inquire as to whether the conduct of respondent's counsel in quoting on Page 12 of the brief from *Schilling vs. Delaware and H. R. Corporation*, 114 F. (2d) 69, commends itself for candor. The quotation on Page 12 of respondent's brief is calculated only to induce the court to believe that the evidence was insufficient. This impression has been created because petitioner has omitted the last and most vital sentence in the quoted paragraph, which is as follows:

> "Though the evidence was meager, we are not prepared to say, however, that it was not enough to submit this ground of negligence to the jury under proper instructions."

The argument of respondent's counsel is far more contradictory and inconsistent than that made by petitioner's counsel to the jury. On assumed risk, respondent argues that petitioner's testimony as to a crack in the tender should be accepted, and, therefore, he "knew it the day before" and "had ample time to protest and opportunity to do so" and hence did not "have to make a sudden choice." Upon the subject of negligence, respondent then argues that since the jury found there was no crack or leak, it should be held that there was no evidence "as to how long the ice was there and how it happened to be there."

Respondent's argument that petitioner committed perjury was presented to and rejected by the tribunal constitutionally appointed to try the issue. Such argument over-

looks the fact that the verdict was for the petitioner and not for the respondent. It ignores the field of mistake. It misinterprets the issue and improperly extends the operative scope of a civil verdict. Respondent forgets that the *falsus in uno* charge was submitted at its own request (R. 122).

No rule is more thoroughly established in this court than that issues depending on the credibility of witnesses and the effect or weight of evidence are to be decided by the jury, reasonable doubts being resolved in favor of and not against the verdict rendered. *Gunning vs. Cooley*, 281 U. S. 90.

Apparently respondent is under the impression that there is some rule of law to the effect that only its employees who are not injured and who testify for their master are honest, truthful and reliable.

The charge is a false and cowardly one and is tantamount to the *argumentum ad hominem*, which is always a confession of weakness.

Would counsel concede that the general verdict in favor of the petitioner establishes the perjury of all of respondent's witnesses on the other features of the case? If by the answer to the special interrogatory the jury has found that petitioner was wrong with respect to the existence of a crack or a leak, then has not the same tribunal with equal conclusiveness found by the general verdict under the charge of the court that respondent and its witnesses were wrong on the other features submitted to them?

The assertion that the trial almost in its entirety centered about the charge with reference to the crack in the tender is likely to mislead the reader. There was abundant evidence upon both sides with respect to the proper and careful method of filling the tank without overflow and with reference to the impropriety, self-evident anyway, of permitting it to spill on the deck.

The answer to the special interrogatory amounts to nothing more than a finding by the jury that petitioner failed to meet the burden of proof on this question—in other words, that the preponderance of the evidence was with the respondent.

CONCLUSION

It is respectfully submitted that petitioner is entitled to a reinstatement of the original verdict and judgment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 124

NORVEL H. LILLY,
Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

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GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

Petitioner's statement of the case (Pet. 1-5) is inaccurate and misleading in the respects hereinafter stated.

They state (Pet. 2) that "the Illinois Courts refused to apply the provisions of the Safety Appliance Act" and that those courts refused to apply Rule 153 of the Interstate Commerce Commission. The complaint charged (R. 3) that the defendant:

> (a) Negligently supplied a defective hook with which the plaintiff pulled the water spout over the tender;
>
> (b) That the defendant negligently supplied a water spout which was defective.

Petitioner's counsel voluntarily dismissed paragraphs (a) and (b) at the close of Petitioner's case (R. 84). The following three charges of negligence on which the case went to the jury are set forth verbatim as they appeared in the complaint (R. 4):

"(c) The defendant did carelessly, negligently, wrongfully and unlawfully furnish the plaintiff with a place to work and require the plaintiff to work at a place, in the performance of his duties as employee, which place was unsafe and dangerous to human safety in that the defendant required the plaintiff, in the performance of his duties, to stand and be upon the engine tank described heretofore for the purpose of moving the water spout over to the engine tank to supply water to this engine tank, yet the defendant carelessly, negligently and wrongfully allowed, caused and permitted ice to be, remain and accumulate on this engine tank at the place where it required plaintiff to so work in the performance of his duties, with great danger to plaintiff; and of these facts the defendant had due notice, and by and through such careless, negligent and wrongful conduct on the part of the defendant, plaintiff, while he was in the performance of his duties as employee of this defendant, attempting to move the water spout in position over the tank, was by reason of the ice on the tank caused to slip and fall and lose his balance, and was caused to be thrown, drop off the engine tank to the ground, and sustain serious injuries.

(d) (R. 5) Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that the defendant required, caused and permitted plaintiff to work on the tender of the locomotive of his train on the occasion above charged; in the act of putting water in the tender of the locomotive, this tender was unsafe because the top where the plaintiff was required to work was

slippery and covered with ice and other slippery materials to endanger his life or limb, and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition on top of the tender and was thrown and caused to fall and be seriously injured.

(e) (R. 8) Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard, Michigan, a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the defendant did operate this locomotive and tender with the tender of this locomotive at the part where the water is supplied to and poured into the locomotive to be cracked, worn and split; so as to occasion and permit the leaking of water from and through this crack, hole and aperture and to flood, seep and cover the top of the tender where plaintiff was required to be in the performance of his duties as employee, rendering it likely and liable for the water to freeze and cause a dangerous condition, and thereby, by reason of this violation on the part of the defendant of this Federal Safety Appliance Act, the water in this tender did leak through this defective place onto the top of the tender, and did freeze, and it thereby caused plaintiff, while he was so at work, as above charged, on the top of this tender, to slip and be thrown and seriously injured."

The trial court permitted all witnesses to be examined on direct and cross-examination as to whether there was a leak or crack in the tender.

The plaintiff testified (R. 27):

"I noticed water on that tender this day (the day before the accident). I noticed water leaking on this engine, that there was water coming from some place on this engine.

'Q. Tell us exactly what you saw about that?

A. Well, in front of the manhole where the—that is the hole that the spout is put down into to take

the water, right at the seam on top of the tender where the two join together, there was water coming out of there, at the front of this manhole, right at the seam.'

"It was coming out in a stream, not a big stream, just a small stream like spurting out and spreading over the tender. The manhole is about fifteen or eighteen inches wide and about ten to twelve inches high, about three feet long. The stream of water was coming out from the seam right in front of the manhole, right where the manhole and the top of the tender is riveted together; it was right at the seam, where the two join. It was a very small stream, I will say about like a small nail."

At the conclusion of all the evidence, *at the request of plaintiff's counsel* (R. 175) the Court instructed the jury as follows (R. 177):

"Plaintiff makes several charges in his complaint. One charge is that the defendant unlawfully violated an Act of Congress relating to locomotive engines known as a Safety Appliance Act: He charges that defendant used on this occasion a locomotive and tender which was in improper condition and unsafe because at a place on the tender where water is supplied, it was cracked, worn and split so as to occasion and permit water leaking from this crack to flood, seep and cover the top of the tender, rendering it likely to freeze, and that such water did freeze on the top of the tender where plaintiff was so at work, and that he was thereby caused to slip and be thrown."

In the closing argument petitioner's counsel dramatically concluded the arguments in the case by saying (R. 169):

"So, as I say, gentlemen, don't find that there was no leak, or you put him out of court."

The jury were specifically interrogated and answered as follows (R. 169):

"Interrogatory No. 1: Was there, at the time of the accident in question, a leak in or near the manhole collar on the tender in question?

Answer: No."

The trial, as stated by Petitioner (Pet. 6), was fair and impartial and under instructions that admittedly expressed correct principles of law.

No court in Illinois was ever asked by the Petitioner to apply the provisions of Rule 153 of the Interstate Commerce Commission until the petition for rehearing was filed in the Appellate Court of Illinois (R. 203).

On the charge of a violation of the Safety Appliance Act as set forth in Petitioner's complaint it is to be seen that the courts have given full consideration to such charge. What counsel for Petitioner mean to say is that after the Appellate Court found against them they sought to switch the issue and inject into the case a claimed violation of Rule 153 (a) and (b) of the Interstate Commerce Commission and that the Appellate and Supreme Courts of Illinois have refused to permit that to be done.

On page 4 of the petition counsel say that the ice was not deposited on the tender by natural causes. As appears herein, only one issue was tried. That was whether the ice came upon the tender because of a leak or crack in the tender as charged in the complaint, paragraphs (c), (d) and (e), as was testified to by the plaintiff and as argued by counsel. The only reference in the case anywhere as to the other possible sources of the water and the consequent ice was purely by speculation made in argument of counsel objecting to the injection into the case on appeal of new issues. (Exhibits, page 4 of Answer of Respondent in Supreme Court of Ill.)

ARGUMENT.

I.

The Jury Found, After a Full and Fair Trial, That There Was No Violation of the Safety Appliance Act.

As is to be seen from the pleadings, the evidence, the arguments of counsel and the charge to the jury submitted at the request of Petitioner's counsel, the only testimony offered was with respect to a violation of the Safety Appliance Act in that there was a leak or crack in the tender near the water hole. After a full and fair trial, the jury found there was no such crack or leak. We submit counsel's statement (Rec. 14) to the effect that the issue as to whether ice alone constituted a violation of the Act was submitted to the jury is not supported by the record.

It was only in desperation that they brought a new issue into the case when they alluded in their petition for rehearing to Rule 153 of the Interstate Commerce Commission. We do not dispute that the Interstate Commerce Commission has the right to adopt the rules referred to. That the reference to the rules was purely an afterthought is readily apparent when Rule 153 is read in connection with the instruction to the jury, prepared and submitted by Petitioner, as to what the issues were under the Safety Appliance Act.

The courts, of course, will take judicial notice of the rules of the Interstate Commerce Commission but they do not apply them to a case unless an issue is raised respecting those rules. The purpose of the pleadings is to advise the parties of the issue they are to meet so that they can defend themselves when brought into court. We submit it needs the citation of no authority that one case

may not be stated in a pleading and an entirely different one advanced in the courts of review.

The case of *Thompson* v. *Hocking Valley Ry. Co.*, 45 F. (2d) 155, relied upon by counsel (Pet. p. 17) was one in which the complaint and the facts largely stated a cause of action under the Boiler Inspection Act. The Court said in that regard:

> "It is now apparent that the petition's claim for relief, 'under the Federal Employers' Liability Act and the amendments thereto,' and the stated facts in the petition, went far toward making a case under the Boiler Inspection Act (45 USCA § 22 *et seq.*); indeed, the defect charged pertained wholly to a locomotive boiler and its connections."

The Court in that case recognized that, the parties not having tried the case on the theory of a violation of the Boiler Inspection Act, the record was in no condition for the Court to pass upon the question of such a violation. (Opinion, p. 156.) So we contend here that we ought not to be required to meet the issue as to a violation of the rules of the Interstate Commerce Commission inasmuch as that issue was not tried.

II.

Under Countless Decisions in the Federal Courts, in Illinois and in Other States the Rule Is Well Established That After a Reversal in the Courts of Review on One Issue, a Party Will Not Be Permitted Thereafter to Advance a New Issue to Sustain a Judgment.

May we call your attention to the following cases:

San Juan Light Co. v. *Requena*, 224 U. S. 89. On pages 96 and 97 of the opinion the court said:

> "It is urged that the negligence charged in the complaint related only to the condition of the wiring *inside* the residence of the deceased, and therefore that

the court erred in permitting a recovery on the theory that the defendant was negligent in respect of the maintenance and care of the wires and converters *outside*. This contention must fail. While the complaint was not drafted with commendable precision, and, if critically examined, might be regarded as leaving it uncertain whether the negligence charged related to the wiring inside or to that outside whereby the current was supplied, there was no objection to this uncertainty in the court below. On the contrary, the trial proceeded, as we have seen, upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of a variance. Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review." (Italics ours.)

Snyder v. *Snyder*, 142 Ill. 60. In that case proceedings were instituted to have a conservator appointed for an insane person. In the trial court the case was tried upon the theory that the question was whether the defendant had sufficient mental capacity to transact ordinary business, whereas, under the statute, the question was whether the person was possessed of "sufficient mental capacity to care for and manage his estate." The court was asked to reverse the case because of this error. On page 67 of the opinion the court said:

"Several other instructions given for the defendant announced the same principle in a different form. In view of the instructions given for the defendant at her request, if the theory upon which the court proceeded was not the correct one, it having been adopted

at the request of the defendant, she can not now complain of the action of the court. *Calumet Iron and Steel Co.* v. *Martin*, 115 Ill. 358; *Illinois Central Railroad Co.* v. *Latimer*, 128 id. 163."

Illinois Central R. Co. v. *Egan*, 203 Fed. 937, (C. C. A. 8th). On page 939 of the opinion the court said:

"It is claimed in this court for the first time that the court below erred in holding that this cause is not one arising under the national Employer's Liability Act but under the state statutes of Iowa. Whether this was error it is unnecessary to determine in this action, as this objection was not made by the defendant in the court below, but, on the contrary, it insisted at every stage of the proceeding, from the time the motion to remand was filed until the close of the trial, that the cause was not one arising under the act of Congress but under the Iowa statutes. Therefore, even if it was error, which we do not decide, the defendant having invited it, and induced the court to commit it, it cannot now be heard to complain. *New York Elevated R. R. Co.* v. *Fifth National Bank*, 135 U. S. 432, 441, 10 Sup. Ct. 743, 34 L. Ed. 231; *Walton* v. *Chicago, etc., Ry. Co.*, 56 Fed. 1006, 1008, 6 C. C. A. 223, 225; *Chase* v. *Driver*, 92 Fed. 780, 786, 34 C. C. A. 668, 674; *Mechanics' Insurance Co.* v. *C. A. Hoover Distilling Co.*, 182 Fed. 590, 593, 105 C. C. A. 128, 131, 31 L. R. A. (N. S.) 873.

Nor is it permissible for one who tries his case upon one theory to change his position in the appellate court and ask for a reversal upon another and inconsistent theory. *New York, etc. Ry. Co.* v. *Estill*, 147 U. S. 591, 614, 13 Sup. Ct. 444, 37 L. Ed. 292; *Lesser Cotton Co.* v. *St. L., I. M. & S. Ry. Co.*, 114 Fed. 133, 142, 52 C. C. A. 95, 104; *Chicago, etc., Ry. Co.* v. *Voelker*, 126 Fed. 522, 529, 65 C. C. A. 226, 233, 70 L. R. A. 264; *Missouri, etc., Ry. Co.* v. *Wilhoit*, 160 Fed. 440, 443, 87 C. C. A. 401, 404."

M. K. & T. Ry. Co. v. *Wilhoit*, 160 Fed. 440, (C. C. A. 8th). The action instituted was to recover damages for personal injuries received by the plaintiff as a section

man in defendant's employ. The trial resulted in a judgment for the plaintiff, and while the judgment was reversed on other grounds, the court said on page 443 of the opinion:

> "We come next to several assignments predicated upon instructions refused, and others given, bearing upon the question, whether the plaintiff has assumed the risk of injury incident to his continued use of the defective car. The Court of Appeals was of opinion that this defense was not available to the defendant because it was not affirmatively pleaded in the answer. But the question of pleading thus suggested was not raised upon the trial. On the contrary, as the record discloses, each of the parties, without objection from the other, introduced testimony addressed to the question of the plaintiff's assumption of the risk, both presented requests for instructions bearing thereon, and the court charged the jury upon that subject. *We must, therefore, give effect to the settled rule, that when the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court of review.*" (Italics ours.)

See also:

Lesser Cotton Co. v. *St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, (C. C. A. 8th).

Davis v. *Ill. Collieries*, 232 Ill. 284.

Gascoign v. *Met. El. Ry.*, 239 Ill. 18.

III.

There Was No Violation of the Boiler Inspection Act or the Safety Appliance Act Merely Because of Ice on the Deck of the Tender.

The jury found that mechanically there was nothing wrong with the tender or water tank. The presence of ice upon the deck of the tender had nothing to do with

its mechanical operation. This did not constitute a defect within the meaning of the Safety Appliance Act or the Boiler Inspection Act. In the case of *Ford* v. *N. Y.; N. H. & H. R. Co.*, 54 F. (2d) 342 (C. C. A. 2d), in which certiorari was denied, 285 U. S. 549, the evidence showed that there was grease on the handhold of one of the grab irons on the locomotive. In all other respects the locomotive was in good working condition. The Court held that this did not constitute a violation of the two Acts mentioned and in so doing said on page 344 of the opinion:

> "An examination of the debates in Congress on the passage of these acts, shows no intention by Congress to impose civil liability for a condition occurring during the operation of the train which does not affect the construction and maintenance as required by the Safety Appliance Act. 61st Congress, 2d Session, Senate Documents, 446; 52d Congress, vol. 23, Congressional Record, pp. 592-5; volume 24, pp. 1273-1287; Senate Committee Report, vol. 24, Congressional Record, pp. 1246-1251."

Reeves v. *Chicago, St. P., M. & O. Ry. Co.*, 179 N. W. 689 (147 Minn. 114). In this case an employee met injuries because of a piece of coal upon a step leading to the locomotive cab. The Court held this did not constitute a violation of either Act, and said on page 690 of the opinion:

> "Plaintiff also contended that the federal 'Boiler Inspection Act,' so-called (U. S. Comp. St. §§ 8630-8639), as amended in 1915 (U. S. Comp. St. §§ 8639a-8639d), so as to 'apply to and include the entire locomotive and tender and all parts and appurtenances thereof,' and which makes it unlawful to use any locomotive engine propelled by steam power in moving interstate traffic unless the boiler and appurtenances thereof are in proper condition and safe to operate, and providing for inspection from time to time, creates a liability on the facts of this case. We think this act must be construed, as was the Safety Appliance Act, so as not include cases where some

> foreign substance has found a temporary lodgment upon the appliances of the locomotive or tender, and which is not the result of the ordinary use of such instrumentalities, but, came there accidentally from some unforeseen cause."

Slater v. *Chicago, St. P., M. & O. Ry. Co.*, 178 N. W. 813 (146 Minn. 390). In this case the plaintiff met his injuries because a trespasser without the knowledge of the railroad displaced an ice bunker so that it projected upon the running board. On page 814 of the opinion the Court said:

> "Does the fact that a trespasser surreptitiously has placed a temporary obstruction like a loose board or cover upon a running board of a railroad car show a violation of the act referred to? We think not. The running board itself was secure and mechanically perfect. There is no hint of any defect therein either as to material, workmanship, or design. The statute ought not to be construed as guaranteeing against the acts of trespassers, at least not unless such acts render the running board itself mechanically insecure. Sleet makes a running board insecure or unsafe for use; yet, we apprehend, it will not be contended that the Safety Appliance Statute is violated if a brakeman slips upon a running board coated with ice during a sleet storm."

The Supreme Court of Illinois in *C., R. I. & P. Ry. Co.* v. *Benson*, 352 Ill. 195 (185 N. E. 244) held the Safety Appliance Act was not violated where wire was wrapped around the grabirons. The Court said on page 200 of the opinion:

> "The grab-irons or hand-holds on the car in question complied with this section of the act. The wire which had been placed thereon by some person was no part of the grab-iron. (*Reeves* v. *C., S. P., M. & O. Ry. Co.*, 179 N. W. 689; *Slater* v. *C., S. P., M. & O. Ry. Co.*, 178 id. 813; *Craver* v. *Franklin Cotton Mills*, 145 S. E. 570.)"

Harlan v. *Wabash Ry. Co.*, 73 S. W. (2d) 749 (Supreme Ct. of Mo. 1934). It was claimed in this case that the

failure of fellow employees to close a trap door in the floor of the cab over the stoker constituted a violation of the Boiler Inspection Act and the Safety Appliance Act. The Court said, on pages 752 and 753 of the opinion:

> "Defendant contends, and we think correctly so, that the facts proven do not show or constitute a violation of the Boiler Inspection Act, under our ruling in *Riley* v. *Wabash Ry. Co.*, 328 Mo. 910, 44 S. W. (2d) 136, 139. The evidence here does not show any mechanical defect from use or originally in the engine or any appliance thereof. It was not a mechanical defect or any faulty construction to have a trapdoor in the floor of the engine cab for the purpose of affording access to the coal conveyor operating underneath the floor. Such was proper and necessary in case this mechanical stoker became clogged or needed adjustment of repair. The trapdoor was without defect and operated safely in the way and for the purpose intended. It was intended to be closed when not in use and the engine became 'unsafe to operate in the service to which the same was put' only because of the negligent act of leaving the trapdoor open when it ought to have been closed. The Boiler Inspection Act (45 U. S. C. A. § 22 *et seq.*), like the Safety Appliance Act (45 U. S. C. A. § 1 *et seq.*) was not intended to cover the negligent act of an employee in the use or misuse of an appliance safe and proper in itself and free from mechanical defects."

In *Riley* v. *Wabash Ry. Co.*, 44 S. W. (2d) 136 it was contended that placing a clinker hook on the tender tank in such a way as to make it an element of danger constituted a violation of the Safety Appliance or Boiler Inspection Acts. The Court said on page 141 of the opinion:

> "The gist of plaintiff's instruction, authorizing a verdict against defendant, is that if the jury found that the servants or agents of defendant company, placed the clinker hook on top of the tender tank in a loose, insecure, and unsafe position, so as to render the tender unsafe to operate, resulting in plaintiff's injury, then defendant was liable, not having complied

with the Boiler Inspection Act. The instruction does not require the jury to find that there was any defect, or that the tender was not properly equipped. All the jury was required to find was that defendant's servants or agents had misplaced the clinker hook, thereby creating the unsafe condition.

"This is not sufficient for a recovery under the Safety Appliance Act or Boiler Inspection Act."

IV.

The Amendment of August 11, 1939, Was Not Retroactive.

The accident in this case happened on February 6, 1937. The suit was filed in Chicago on January 27, 1939. The trial before the jury was completed in June of 1939, and on June 10, 1939 (R. 12) the appeal was perfected to the Appellate Court. It is to be seen, therefore, that two months before the statute was amended the trial of the above case had been completed. The court instructed the jury *at the request of Petitioner* (R. 175) that assumed risk was a defense which the defendant was required to establish by the greater weight of evidence (R. 179). The Petitioner recognized, thereby that assumed risk was a complete defense if properly established.

Counsel rely upon Section 3 of the Federal Employers Liability Act relating to contributory negligence which uses the terms "in all actions hereafter brought." It is difficult to follow the reasoning of counsel for Petitioner when they allude to that Act. That Act was adopted in 1908 and the amendment in question did not take effect until long after the suit at bar was tried and judgment had been entered in the trial court.

This court, in the case of *Winfree* v. *Northern Pacific*, 227 U. S. 296, held that the first Workmen's Compensation Act was not retroactive. The cause of action accrued in the Winfree case before the statute was passed. An employee working as an engineer met his death while work-

ing in interstate transportation. The court held an action could not be maintained under the Federal Employers Liability Act of 1908, and in so doing said:

> "* * * statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required."

This court, since its very earliest decisions, has recognized that it is a fundamental rule of statutory construction that a statute is not to be given a retroactive effect unless by the plain words of the statute such a construction is unavoidable. In the early case of *United States* v. *Heth*, 3 Cranch 399, the Collector of Customs prior to the enactment of the statute on June 30, 1800 had received certain sums of money for which he was to be compensated on a percentage basis. By the act of June 30, 1800 his compensation was restricted to a smaller commission of 2½% on the amounts collected. The court held the statute did not affect the prior transactions and in so doing said on page 413 of the opinion:

> "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Murray v. *Gibson*, 56 U. S. 421 (15 Howard). In this case a statute of Mississippi passed in 1846 declared that no record of any judgment recovered in a foreign court

against a citizen of Mississippi should be received as evidence after the expiration of three years from the time of rendition of such judgment. This court held that the statute had no application to a judgment rendered before its passage. In so doing the court said on page 423 of the opinion:

> "As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only."

McEwen v. Den, 65 U. S. 242 (24 Howard). Prior to 1856 under the laws of Tennessee a deed could not be acknowledged or proven in another state before the Clerk of a court. In 1856 a law was passed allowing this to be done. The court held that this statute was prospective only and in so doing said on page 244 of the opinion:

> "It is insisted, that the act is retrospective as well as prospective in its operation, and covers the acknowledgment made in 1839, in New York.
>
> "We think the statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to wit, that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears."

Sohn v. Waterson, 84 U. S. 596, (17 Wallace): The appeal in this case was from the Circuit Court for the District of Kansas. A right of action had accrued in 1854. The statute of limitations passed in 1859 barred all actions of the character involved unless commenced within two years next after the cause of action accrued. The court held that the statute did not affect the right of action which accrued in 1854 but that the two-year period started to run from the date of the statute. In so doing the court said on pages 598 and 599 of the opinion:

> "The plaintiff contends that the statute of Kansas cannot apply to actions which accrued more than two

years before its passage, because it would cut them off and defeat them altogether, and would thus impair the obligation of contracts.

"A literal interpretation of the statute would have this effect. But it is evident that the legislature could not have had any such intention. The court below held, that as the defendant was a resident of Kansas when the act took effect, the time of limitation began to run in his favor as against the present cause of action from that period; and that the action might have been brought at any time within two years afterwards; and not having been brought within that period it was barred. In other words, the court held that the act was prospective in its operation, and affected existing causes of action only from the time of its passage. This seems to us a reasonable construction and one that prevents the legislative intent from being frustrated. 'Words in a statute,' says Justice Paterson, 'ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' And this rule is repeated by this court in *Harvey* v. *Tyler*, where it is said: 'It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect.'"

Chew Heong v. *United States*, 112 U. S. 536. A statute passed in 1882 prescribed that a Chinese laborer should present a certificate on reentering the United States and that the certificate so prescribed would be the only evidence permissible to establish his right of entry into the United States. Prior to the enactment of this statute Heong had left the United States. The court held that the statute of 1882 did not affect his rights and that Heong could return under the terms existing when he left. In so doing the court said on page 559 of the opinion:

"We have stated the main reasons which, in our opinion, forbid that interpretation of the act of Congress. To these may be added the further one, that

the courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In *United States* v. *Heth*, 3 Cranch, 398, 413, this court said, that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the settled doctrine of this court. *Murray* v. *Gibson*, 15 How. 421, 423; *McEwen* v. *Den*, 24 How. 242, 244; *Harvey* v. *Tyler*, 2 Wall. 328, 347; *Sohn* v. *Waterson*, 17 Wall. 596, 599; *Twenty Per Cent. Cases*, 20 Wall. 179, 187."

In the recent case of *United States* v. *St. Louis etc. Ry. Co.*, 270 U. S. 1, the same view was taken by the Court. The opinion in that case was rendered by Mr. Justice Brandeis. The suits in this case were for services rendered the War Department prior to federal control. The suits were instituted in the court of claims more than three years after the cause of action accrued but within six years. The Transportation Act of 1920 fixed a three-year limitation period. In holding the act not retroactive Justice Brandeis rendering the opinion for the court said, page 3:

"That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure, *United States Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435. There is nothing in the language of paragraph 3 of § 16, or in any other provision of the Act, or in its history, which requires us to hold that the three-year limitation applies under any circumstances, to causes of action existing at the date of the Act."

V.

There Is No Evidence in the Record to Support a Finding of Negligence on Behalf of the Defendant.

The answer of the jury to the special interrogatory definitely eliminates any claim of negligence because of a defective water tank.

Petitioner in support of his point III refers to the record as follows: R. 27-28, 34-35, 100-101, 118, 125, 130-131. An examination of those parts of the record discloses the following:

At pages 27 and 28 the testimony of the Petitioner was to the effect that there was a crack or leak in the tender. It was unequivocal testimony which the jury by their answer to the special interrogatory found to be false. That reference to the record does not support Petitioner's statement.

The record, at pages 34 and 35, is the testimony of Petitioner to the effect that the Petitioner did not splash the water over when he was putting the water in the tank on the tender.

At pages 100 and 101 the engineer, A. E. Granger, testified that when the water gets to the top of the tank the force of the water is such that it will splash out of the manhole just as when water is coming out of a faucet.

At page 118 of the record the testimony of conductor P. K. Holton was to the same effect as that of engineer Granger. At page 125 of the record Francis Smith, a fireman, testified that such splashing of the water when it comes in with force was the ordinary occurrence. At pages 130 and 131 brakeman Findley testified to the same common and ordinary occurrence.

It is to be seen, therefore, that the reference to the record does not demonstrate that "it was established to the

point of demonstration that the water and ice accumulated because the employee who previously filled the tank had negligently permitted an overflow." The record is silent as to the identity of the so-called previous employee. There is no testimony whatsoever that there was "an overflow."

In order to sustain a recovery there must be some evidence of negligence of the defendant. The record is utterly lacking in this essential.

But even if the ice had been put there negligently through the act of other employees Petitioner's full knowledge of it constituted an assumption of the risk by him. *Missouri Pacific* v. *Aeby*, 275 U. S. 426; *Hatton* v. *New York, N. H. & H. R. Co.*, 261 Fed. 667 (C. C. A. 1st); *Wichita Falls & S. R. Co.* v. *Wade*, 57 S. W. (2d) 332 (Ct. of Civ. App., Texas, 1932); *Missouri Pacific* v. *Lane*, 56 S. W. (2d) 175 (186 Ark. 807).

VI.

After the Verdict Establishing Petitioner's Perjury There Was Nothing in the Record to Sustain the Charges of the Complaint.

We have no disagreement with the argument that the trial court should have submitted the case to the jury, but once the jury found from all the evidence that the plaintiff's testimony was false when he claimed that there was a leak or crack in the tender, under the undisputed evidence the trial court should have entered a judgment for the defendant notwithstanding the verdict as was ordered by the Appellate Court. There was no evidence of negligence of the Respondent with respect to the ice. The evidence shows that Petitioner, only, knew of this ice and he reported it to no one. The Respondent, so far as this record shows, had no knowledge of its presence and there could be no recovery until it did have notice of the condition. *Hatton* v. *N. Y., N. H. & H.*, 261 Fed. 667, 669 (C. C.

A. 1st); *Schilling* v. *D. & H. R. Co.*, 114 F. (2d) 69 (C. C. A. 2d); *Great Northern Ry. Co.* v. *Johnson*, 207 Fed. 521 (C. C. A. 8th).

In the case of *Tobin* v. *Detroit, T. & I. R. Co.*, 13 N. E. (2d) 739 (57 Ohio App. 306) the Court held there was no violation of the Safety Appliance Act because of frost on a running board. In so doing the Court said on page 744 of the opinion:

> "Generally stated, the law is that the falling of snow and the natural formation of ice does not in itself constitute evidence of negligence of a railroad in respect to its property, but negligence may occur in relation to snow and ice, and we see no reason why the rule should not apply to frost.
>
> In every instance, however, there must be actual or constructive knowledge by the carrier, of the snow, ice, or frost attended by the carrier's negligent act or omission, before there can be liability. In this case there was no such situation."

On the whole record there was nothing for the jury after they found no defect in the tender.

Conclusion.

Petitioner's complaint in great detail charged negligence of the Respondent in supplying a tender that was cracked and leaked. The Petitioner, on the trial of the case, testified to such a story at great length, and to that story only, and the trial of the case almost in its entirety centered about that charge. The jury made a special finding of fact that there was no such leak or crack in the tender and thereby, without qualification, branded all the Petitioner's testimony in this regard as false. On that charge of a violation of the Safety Appliance Act there clearly could be no recovery. There was no evidence of any other facts known to the Respondent which would constitute negligence.

Can it be that the Petitioner may come into court in a

trial, admitted to be fair, and tell a story, found to be false by a jury of his peers, and now be permitted to proceed on an issue injected into the case after his dishonor has been exposed and the attempt to corrupt the legal processes has been frustrated? It is submitted that he ought not and that certiorari be denied.

Respectfully submitted,

H. Victor Spike,
Silas H. Strawn,
Harold A. Smith.
For Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 124

NORVEL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

BRIEF OF RESPONDENT.

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Statement of Jurisdictional Grounds.

Liability is predicated upon the Federal Employers Liability Act and the so-called Safety Appliance Acts of Congress.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 124.

NORVEL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

The accident occurred on the 6th day of February, 1937. The "run" of the local freight train upon which the petitioner was working extended from Durand, Michigan sixty miles into Milwaukee Junction, which is on the outskirts of Detroit. The engine and crew, including petitioner, left Durand the day before, took their train into Milwaukee Junction, laid over night and were making the return trip to Durand, with the same engine at the time of the accident at Ferndale, seven miles out (R. 24).

One of petitioner's duties as brakeman was to take on water. The engine had stopped at the waterspout at Ferndale for that purpose. The engineer and fireman were in the cab. Petitioner got upon the tender and found that

there was ice on the deck of it. While pulling the waterspout around the hook slipped from the waterspout and petitioner slipped on the ice, lost his balance and fell over the side of the tender to the ground from which he sustained his injuries (R. 13).

Petitioner testified "in front of the manhole where the—that is the hole that the spout is put down into to take the water, right at the seam on top of the tender where the two join together, there was water coming out of there, at the front of this manhole, right at the seam." He testified that it was a small stream and that it spread over the tender. That was the day before the accident (R. 20; 49). Though the engineer is supposed to report in writing at the end of the run any defects reported to him (R. 49, 68) yet petitioner told no one about this condition (R. 53, 68).

Petitioner's testimony about the leak is all the direct testimony there is in the record as to how the ice got there. Since that source was eliminated by the special verdict speculation alone was left as to whether it came there from the negligence of other employees, the weather, or acts of third parties. The engine had been out of the roundhouse on this run about 40 or 50 minutes when the accident happened (R. 21). The engine was filled at the roundhouse the night before and put in the roundhouse until needed (R. 89). The temperature outside the morning of the accident was 20 or 30 degrees above zero (R. 23). The roundhouse was warmer than the outside (R. 23).

In the complaint were five paragraphs charging negligence. Paragraph 4(a) charged that the respondent negligently supplied a defective hook with which the waterspout was pulled over the tender and 4(b) charged that the respondent negligently supplied a waterspout which was defective. Paragraphs 4(a) and (b) were voluntarily dismissed by the petitioner at the close of his case (R. 59). Inasmuch as the allegations of the three remaining para-

graphs of the complaint are involved on this appeal we set them forth verbatim:

"4(c) The defendant did carelessly, negligently, wrongfully and unlawfully furnish the plaintiff with a place to work and require the plaintiff to work at a place, in the performance of his duties as employee, which place was unsafe and dangerous to human safety in that the defendant required the plaintiff, in the performance of his duties, to stand and be upon the engine tank described heretofore for the purpose of moving the waterspout over the engine tank to supply water to this engine tank, yet the defendant carelessly, negligently and wrongfully allowed, caused and permitted ice to be, remain and accumulate on this engine tank at the place where it required plaintiff to so work in the performance of his duties, with great danger to plaintiff; and of these facts the defendant had due notice, and by and through such careless, negligent and wrongful conduct on the part of the defendant, plaintiff, while he was in the performance of his duties as employee of this defendant, attempting to move the waterspout in position over the tank, was by reason of the ice on the tank caused to slip and fall and lose his balance, and was caused to be thrown, drop off the engine tank to the ground, and sustain serious injuries." (R. 3.)

"(d) Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that the defendant required, caused and permitted plaintiff to work on the tender of the locomotive of his train on the occasion above charged, in the act of putting water in the tender of the locomotive, this tender was unsafe because the top where the plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life and limb, and the tender leaked there, and while he was so at work, as above charged, he slipped

on this slippery and unsafe condition on top of the tender and was thrown and caused to fall and be seriously einjured." (R. 4.)

"(e) Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard, Michigan, a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the defendant did operate this locomotive and tender with the tender of this locomotive at the part where the water is supplied to and poured into the locomotive to be cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, hole and aperture and to flood, seep and cover the top of the tender where plaintiff was required to be in the performance of his duties as employee, rendering it likely and liable for the water to freeze and cause a dangerous condition, and thereby, by reason of this violation on the part of the defendant of this Federal Safety Appliance Act, the water in this tender did leak through this defective place onto the top of the tender and did freeze, and it thereby caused plaintiff, while he was so at work, as above charged, on the top of this tender, to slip and be thrown and seriously injured." (R. 6.)

At no place in the complaint or in the testimony was it charged that there was a violation of the rules of the Interstate Commerce Commission. These rules were first alluded to when the petitioner filed his petition for rehearing in the Appellate Court of Illinois (R. 144).

In the trial court petitioner's theory of the case as to the Boiler Inspection Act was evidenced by an instruction prepared by him and given at his request as follows (R. 118):

"Plaintiff makes several charges in his complaint. One charge is that the defendant unlawfully violated an Act of Congress relating to locomotive engines known as a Safety Appliance Act: He charges that defendant used on this occasion a locomotive and

tender which was in improper condition and unsafe because at a place on the tender where water is supplied, it was cracked, worn and split so as to occasion and permit water leaking from this crack to flood, seep and cover the top of the tender, rendering it likely to freeze, and that such water did freeze on the top of the tender where plaintiff was so at work, and that he was thereby caused to slip and be thrown."

On the trial of the case all of the witnesses, and particularly the petitioner, were interrogated at great length about the alleged leak or crack in the tender. The entire trial centered on that claimed defect. When the case was given to the jury the trial court submitted an interrogatory as follows (R. 114): "Was there, at the time of the accident in queston, a leak in or near the manhole collar on the tender in question?" The jury answered that interrogatory "No." Counsel for the petitioner on the trial had the right under the Illinois law to make the final argument, and in making that argument he dramatically concluded by saying: "So, as I say gentlemen, don't find that there was no leak, or you put him out of the court." (R. 113.)

Before the institution of suit the respondent had supplied the petitioner with hospital and medical care (R. 29) and in addition had advanced the petitioner the sum of $1,375 (R. 60).

The respondent made no motion for a new trial but filed a motion for judgment notwithstanding the verdict, (R. 114) making three points—first, that the petitioner assumed the risk; second, that there was no proof of interstate commerce; and third, that there was no proof of any negligence on behalf of the respondent.

SPECIFICATION OF ERRORS ARGUED.

1. The facts of the case do not warrant leaving the defense of assumed risk to the jury.

2. There is no evidence that the respondent had notice of the presence of the ice.

3. The amendment of August 11, 1939 was not retroactive.

4. There is no evidence in the record to support the charge of negligence.

5. Petitioner cannot ground his case here on Rule 153 of the Interstate Commerce Commission.

6. The petitioner's testimony found to be false by the jury justifies an affirmance of the Appellate Court judgment.

SUMMARY OF THE ARGUMENT.

I.

The Facts of This Case Do Not Warrant Leaving the Defense of Assumed Risk to the Jury.

Great Northern v. *Leonidas*, 305 U. S. 1.
Keys v. *Pennsylvania R. R. Co.*, 308 U. S. 529.
Seaboard Air Line v. *Horton*, 233 U. S. 492.
Southern Ry. Co. v. *Crockett*, 234 U. S. 725.
Jacobs v. *Southern Ry. Co.*, 241 U. S. 229.
C. & O. R. R. Co. v. *DeAtley*, 241 U. S. 310.
Baugham v. *N. Y. P. & N. R. Co.*, 241 U. S. 237.
Boldt v. *Pa. R. R. Co.*, 245 U. S. 441.
T. St. L. & W. R. Co. v. *Allen*, 276 U. S. 165.
C. & O. R. R. Co. v. *Nixon*, 271 U. S. 218.
Roberts Federal Liability of Carriers, Vol. II, 2nd Ed., Sec. 825, p. 1597.

II.

There Is No Evidence That the Respondent Had Notice of the Presence of the Ice.

Missouri Pac. v. *Aeby*, 275 U. S. 426, 430.
Schilling v. *D. & H. R. Corporation*, 114 F. (2d) 69 (C. C. A. 2d, 1940).
Hatton v. *N. Y., N. H. & H. R. Co.*, 261 F. 667, 669 (C. C. A. 1st, 1919).
Great Northern Ry. Co. v. *Johnson*, 207 F. 521, 524 (C. C. A. 8th, 1913).
C. & O. R. R. Co. v. *Mihas*, 280 U. S. 102, 108.

III.

The Amendment of August 11, 1939 Was Not Retroactive.

Winfree v. *Northern Pacific R. Co.*, 227 U. S. 296.
United States v. *St. Louis, etc. R. Co.*, 270 U. S. 1, 3.
United States v. *Heth*, 3 Cranch 399, 413.
Murray v. *Gibson*, 56 U. S. 421, 423 (15 Howard).
McEwen v. *Den*, 65 U. S. 242, 244 (24 Howard).
Sohn v. *Waterson*, 84 U. S. 596, 598, 599 (17 Wallace).
Chew Heong v. *United States*, 112 U. S. 536, 559.
Wichita Falls R. Co. v. *Lindley*, 143 S. W. (2d) 428.

IV.

The Jury Having Found No Leak in the Tender There Is No Evidence in the Record to Support the Charge of Negligence.

Chicago Great Western v. *Rambo*, 298 U. S. 99.

V.

Petitioner Cannot Ground His Case Here on Rule 153 of the Interstate Commerce Commission.

A. To Do So Would Involve Deciding This Case on Issues Not Tried or Submitted to the Jury.

San Juan Light Co. v. *Requena*, 224 U. S. 89, 96, 97.
Illinois Central R. Co. v. *Egan*, 203 F. 937, 939 (C. C. A. 8th).
M. K. & T. Ry. Co. v. *Wilhoit*, 160 F. 440, 443 (C. C. A. 8th).
Snyder v. *Snyder*, 142 Ill. 60, 67.
Lesser Cotton Co. v. *St. Louis, I. M. & S. Ry. Co.*, 114 F. 133 (C. C. A. 8th).
Davis v. *Ill. Collieries*, 232 Ill. 284.
Gascoigne v. *Met. El. Ry.*, 239 Ill. 18.

B. There Was No Violation of the Boiler Inspection Act or Rule 153 Thereunder.

Ford v. *N. Y., N. H. & H. R. Co.*, 54 F. (2d) 342, 344 (C. C. A. 2nd).

Reeves v. *Chicago, St. P. M. & O. Ry. Co.*, 179 N. W. 689, 690 (147 Minn. 114).

Slater v. *Chicago, St. P. M. & O. Ry. Co.*, 178 N. W. 813, 814 (146 Minn. 390).

C. R. I. & P. Ry. Co. v. *Benson*, 352 Ill. 195, 200 (185 N. E. 244).

Harlan v. *Wabash Ry. Co.*, 73 S. W. (2d) 749, 752, 753 (Supreme Ct. of Mo. 1934).

Riley v. *Wabash Ry. Co.*, 44 S. W. (2d) 136, 141.

VI.

Because of the Petitioner's Perfidy the Judgment of the Appellate Court of Illinois Was Correct.

Pomeroy Equity Jur., 5th Ed., Vol. II, Sec. 404.

Soo Line v. *Rock*, 279 U. S. 410.

Ill. Rev. Stat. 1941, Chap. 110, Sec. 189.

ARGUMENT.

I.

Assumed Risk.

This court, in the case of *Great Northern* v. *Leonidas*, 305 U. S. 1, held, in November, 1938, in a suit under the Federal Employers Liability Act, that assumed risk was a defense thereunder, but that in that case it was a question of fact for the jury. After the verdict had been returned in this case and while it was pending in the Appellate Court, in a memorandum opinion in the case of *Keys* v. *Pennsylvania R. R. Co.*, 308 U. S. 529, decided in January, 1940, this court again held that as to that case assumed risk was for the jury. Prior thereto and without exception since the case of *Seaboard Air Line* v. *Horton*, 233 U. S. 492, this court had held that assumed risk was a defense and was, on undisputed facts, a question of law for the court. The case of *Seaboard Air Line* v. *Horton* was followed in numerous decisions by this court, among them being *Southern Ry. Co.* v. *Crockett*, 234 U. S. 725; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 299; *C. & O. R. R. Co.* v. *DeAtley*, 241 U. S. 310; *Baugham* v. *N. Y. P. & N. R. Co.*, 241 U. S. 237; *Boldt* v. *Pa. R. R. Co.*, 245 U. S. 441; *T. St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165; *C. & O. R. Co.* v. *Nixon*, 271 U. S. 218. See Roberts Federal Liability of Carriers, Vol. II, 2nd Ed., Sec. 825, p. 1597.

In the case at bar the petitioner admittedly knew of the existence of the ice and yet without protest proceeded to perform his duties whatever the cause of its being there. Even if his story had been true that it was caused by a leak, he knew it the day before and that the weather was freezing. It was his duty to report any defects to the engineer at the end of their run (R. 49) who each trip turned in a written report of any defect at the roundhouse,

at Milwaukee Junction when they concluded their trip (R. 49), but petitioner made no report of the alleged defect. He had ample time to protest and opportunity to do so with people in a position to correct the alleged wrong, and yet he made no effort in this direction (R. 53). He didn't have to make a sudden choice as counsel for petitioner argue in their brief (p. 41).

This court pointed out in *Seaboard Air Line* v. *Horton* that conduct such as that of the petitioner in this case was assumed risk and not contributory negligence.

The case was clearly one of assumed risk, therefore, under the case of *Seaboard Air Line* v. *Horton* and the numerous cases that followed it, unless this court wishes to expressly overrule them.

II.

Respondent Had No Notice of the Alleged Ice on the Tender.

It is an undisputed principle in cases under the Federal Employers Liability Act that the employer to be held liable must have notice of the dangerous condition or that circumstances be proved from which it must necessarily follow that the employer, in the exercise of reasonable care, would discover the hazard.

As is to be seen from the undisputed facts in this case, no one knows how long the ice had been on the deck of the tender. The weather was clear and cold both on the day of the accident and the preceding day (R. 19). The jury have found that the water did not come there from any leak in the tender as petitioner had falsely testified. Fault or negligence on the part of respondent may not be inferred from the mere fact that petitioner fell and was hurt. *Missouri Pac.* v. *Aeby*, 275 U. S. 426, 430.

Since the record is devoid of any evidence as to how long

the ice was there and how it happened to be there, and since there are no circumstances which have been proved from which it could be reasonably held that the respondent must have known of its presence the essential element of notice is entirely lacking. In the case of *Schilling* v. *D. & H. R. Corporation*, 114 F. (2d) 69 (C. C. A. 2d, 1940), in a suit under the Federal Employers Liability Act the plaintiff sought to recover, because of the alleged negligent failure to repair cinders on a track in which the plaintiff caught his foot where the cinders had washed out. With reference to the question of notice to the defendant of the dangerous condition, the court on page 71 of the opinion said:

> "It was, of course, the duty of the defendant to provide a safe place for the plaintiff to work and such a space in the tie as that in which he caught his foot made it unsafe. Yet proof of that is not alone enough to charge the defendant with liability. It was shown that in the ordinary course of the work the cinder filling in the ties did get washed out, and the duty of the defendant of necessity was one of adequate inspection and timely repair. There is nothing to indicate that the daily inspection provided was not equal to what a prudent man in like circumstances would have done except possibly the testimony by deposition of one trainman in the crew in which the plaintiff worked who came on duty at 4 o'clock that afternoon and testified when asked if he looked at the hole more than once: 'I noticed it all day. It was there before'. He did not report it or state any more definitely the length of time it had been there. As his day began at 4 o'clock that afternoon there was little on which the jury could have found that the hole had been there long enough to charge the defendant with constructive notice and the duty to repair. Proof of actual notice was wholly lacking. One or the other must appear to make out actionable negligence for failure to repair."

Hatton v. *New York, N. H. & H. R. Co.*, 261 F. 667 (C. C. A. 1st, 1919). A suit was prosecuted in this case

against the defendant for negligence in permitting ice to be upon the station platform upon which a gang plank slipped when placed upon it by the trainmen. On page 669 of the opinion the court said:

> "The fact that there was ice on the platform would not of itself warrant a jury in finding that the defendant was negligent. To justify such a conclusion it should have appeared that the defendant knew of its presence and had unreasonably failed to remove it, or that the ice had been there such a length of time that, in the exercise of ordinary care, it ought to have known of it and removed it. *Smith* v. *Railroad*, 73 N. H. 325, 61 Atl. 359. Under the circumstances here disclosed we think there was no evidence from which reasonable men could conclude that the defendant was negligent."

Great Northern Ry. Co. v. *Johnson*, 207 F. 521 (C. C. A. 8th, 1913). On page 524 of the opinion the court said:

> "There is no proof in the record that the railway company knew, or could have known by the exercise of ordinary care, that the pinning of a flue, old or new, would cause a piece to break from the same under the circumstances as detailed by Johnson. An injury that cannot be foreseen or reasonably anticipated as the probable result of negligence is not actionable. *Railway Co.* v. *Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; *McCain* v. *Chicago, B. & Q. R. Co.*, 76 Fed. 125, 22 C. C. A. 99; *Cole* v. *German Savings & Loan Society*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; *Railway Co.* v. *Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Hoag* v. *Railway Co.*, 85 Pa. 293, 27 Am. Rep. 653; *Ness* v. *Great Northern Ry. Co.*, 142 N. W. 165 (Supreme Court, North Dakota, October term, 1912); 5 Thompson on Negligence § 5333."

See also *C. & O.* v. *Mihas*, 280 U. S. 102, 103.

III.

The Amendment of August 11, 1939, Limiting the Defense of Assumed Risk Was Not Retroactive.

The accident in this case happened on February 6, 1937. The suit was filed in Chicago on January 27, 1939. The trial before the jury was completed in June of 1939, and on June 10, 1939 (R. 9) the appeal was perfected to the Appellate Court. It is to be seen, therefore, that two months before the statute was amended the trial of the above case had been completed. The court instructed the jury at the request of petitioner that assumed risk was a defense which the defendant was required to establish by the greater weight of evidence (R. 119, 116). The petitioner recognized, thereby that assumed risk was a complete defense if properly established.

This court in the case of *Winfree* v. *Northern Pacific*, 227 U. S. 296, held that the first Federal Employers' Liability Act was not retroactive. The cause of action accrued in the Winfree case before the statute was passed. An employee working as an engineer met his death while working in interstate transportation. The court held an action could not be maintained under the Federal Employers Liability Act of 1908, and in so doing said:

> "* * * statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required."

In the recent case of *United States* v. *St. Louis, etc. Ry. Co.*, 270 U. S. 1, 3, the same view was taken by this court. The opinion in that case was rendered by Mr. Justice Brandeis. The suits were for services rendered the War Department prior to federal control. The suits were instituted in the court of claims more than three years after

the cause of action accrued but within six years. The Transportation Act of 1920 fixed a three-year limitation period. In holding the act not retroactive the court said:

> "That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure, *United States Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435. There is nothing in the language of paragraph 3 of § 16, or in any other provision of the Act, or in its history, which requires us to hold that the three-year limitation applies under any circumstances, to causes of action existing at the date of the Act."

The Court of Civil Appeals of Texas in *Wichita Falls & S. R. Co.* v. *Lindley*, 143 S. W. (2d) 428, has specifically held this amendment not retroactive.

This court, since its very earliest decisions, has recognized that it is a fundamental rule of statutory construction that a statute is not to be given a retroactive effect, unless by the plain words of the statute such a construction is unavoidable. In the early case of *United States* v. *Heth*, 3 Cranch, 399, the Collector of Customs prior to the enactment of the statute on June 30, 1800 had received certain sums of money for which he was to be compensated on a percentage basis. By the act of June 30, 1800 his compensation was restricted to a smaller commission of 2½% on the amounts collected. The court held the statute did not affect the prior transactions and in so doing said on page 413:

> "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot

be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Murray v. *Gibson*, 56 U. S. 421 (15 Howard). In this case a statute of Mississippi passed in 1846 declared that no record of any judgment recovered in a foreign court against a citizen of Mississippi should be received as evidence after the expiration of three years from the time of rendition of such judgment. This court held that the statute had no application to a judgment rendered before its passage. In so doing the court said on page 423 of the opinion:

"As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only."

McEwen v. *Den*, 65 U. S. 242 (24 Howard). Prior to 1856 under the laws of Tennessee a deed could not be acknowledged or proven in another state before the Clerk of a court. In 1856 a law was passed allowing this to be done. The court held that this statute was prospective only and in so doing said on page 244 of the opinion:

"It is insisted, that the act is retrospective as well as prospective in its operation, and covers the acknowledgment made in 1839, in New York.

"We think the statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to-wit, that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears."

Sohn v. *Waterson*, 84 U. S. 596, (17 Wallace). The appeal in this case was from the Circuit Court for the District of Kansas. A right of action had accrued in 1854. The statute of limitations passed in 1859 barred all actions of the character involved unless commenced within two years next after the cause of action accrued. The court held that the statute did not affect the right of action which accrued in 1854 but that the two-year period started to run from the date of the statute. In so doing the court said, pages 598 and 599:

> "The plaintiff contends that the statute of Kansas cannot apply to actions which accrued more than two years before its passage, because it would cut them off and defeat them altogether, and would thus impair the obligation of contracts.
>
> "A literal interpretation of the statute would have this effect. But it is evident that the legislature could not have had any such intention. The court below held, that as the defendant was a resident of Kansas when the act took effect the time of limitation began ot run in his favor as against the present cause of action from that period; and that the action might have been brought at any time within two years afterwards; and not having been brought within that period it was barred. In other words, the court held that the act was prospective in its operation, and affected existing causes of action only from the time of its passage. This seems to us a reasonable construction and one that prevents the legislative intent from being frustrated. 'Words in a statute,' says Justice Paterson, 'ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed, to them, or unless the intention of the legislature cannot be otherwise satisfied.' And this rule is repeated by this court in *Harvey* v. *Tyler*, where it is said: 'It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect.'"

Chew Heong v. *United States*, 112 U. S. 536. A statute passed in 1882 prescribed that a Chinese laborer should present a certificate on reentering the United States and that the certificate so prescribed would be the only evidence permissible to establish his right of entry into the United States. Prior to the enactment of this statute Heong had left the United States. The court held that the statute of 1882 did not affect his rights and that Heong could return under the terms existing when he left. In so doing the court said on page 559 of the opinion:

> "We have stated the main reasons which, in our opinion, forbid that interpretation of the act of Congress. To these may be added the further one, that the courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In *United States* v. *Heth*, 3 Cranch, 398, 413, this court said that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the doctrine of this court. *Murray* v. *Gibson*, 15 How. 421, 423; *McEwen* v. *Den*, 24 How. 242, 244; *Harvey* v. *Tyler*, 2 Wall. 328, 347; *Sohn* v. *Waterson*, 17 Wall. 596, 599; *Twenty Per Cent Cases*, 20 Wall. 179, 187."

We submit, there is nothing in the language of the amendment indicating an intention to make it retroactive and that petitioner's contention must fail.

IV.

There Is No Evidence in the Record to Support the Judgment.

Since the petitioner voluntarily dismissed paragraphs (a) and (b) and inasmuch as the jury found there was no defect or leak in the tender as charged in paragraphs (d) and (e), it left only paragraph (c) of petitioner's complaint upon which to base the judgment. That paragraph (R. 3) charged that the respondent negligently permitted ice to be upon the tender.

There is no testimony in the record showing how the ice came to be upon the deck of the tender. The only testimony directly bearing upon the question was that of the petitioner who testified that it came there through a leak or crack in the tender. This story, the jury found to be false by their special verdict.

The presence of the ice upon the deck of the tender can only be accounted for by speculation. Neither the petitioner nor anyone else saw any act which produced the ice. Outside of the petitioner, the record is devoid of any proof that any other employee of the respondent had knowledge that the ice was there. There is no evidence as to how long it had been there. Petitioner worked last on the tender the day before. He made no report of any defect and he was the first one to work on the tender after it left the roundhouse the next morning.

Counsels' desperate need of some evidence of negligence is established by their resort to our speculation in our brief in the Appellate Court of Illinois as to how the ice happened to be there (Petitioner's Br., p. 24). No witness testified that water had splashed out when the tank was filled. In trying to account for its presence there some witnesses testified that could have happened (R. 24; 70; 78).

The Appellate Court in its opinion reversing the judgment of the trial court found that there was no evidence in the record to support the allegations of paragraph 4(c) (R. 136).

Unless facts were established in the record to substantiate the charge of negligence a recovery cannot be sustained. *Chicago Great Western R.* v. *Ramba*, 298 U. S. 99.

V.

Petitioner Cannot Ground His Case Here on Rule 153 of the Interstate Commerce Commission.

A. To Do So Would Involve Deciding This Case on an Issue Not Tried or Submitted to the Jury.

It must be remembered that since Counts (d) and (e) of the complaint were eliminated which specifically charged a leak in the tender, it left only paragraph (c). That paragraph (R. 3) charged that the respondent negligently permitted ice to be upon the deck upon the tender. Counsel now seek to sustain their case upon the theory that respondent violated a statute. We have no quarrel with their argument that Rule 153 has the force of law or that the courts are bound to take judicial notice of the rules of the Interstate Commerce Commission. The vice of their position is that under the statute and rule the respondent is virtually an insurer. Under paragraph (c) we were merely charged with being negligent. Under the statute and rule relied upon by petitioner many different things are involved other than those tried before the jury. The rule requires that the tender be kept clean, obviously free from coal and dust which would fall over from the fuel portion of the tender. The rule requires that means be provided to carry off the waste water. It was never claimed until after the judgment was reversed that means were not provided to carry off the waste

water or that the deck was not clean (R. 209). A superficial examination of the record will show those issues were not tried. So we repeat—the vice of the situation is that the rule presents a distinct issue from that tried before the jury except, of course, for the alleged leak, and on that a jury trial, admitted to be fair under proper instructions, resulted in a finding there was no defect.

We have heretofore pointed out that the entire trial was consumed in thrashing out the issue as to whether there was a leak in the tender as so elaborately and falsely testified to by the petitioner.

If paragraph 4c was meant to charge a violation of the safety appliance acts why were the acts not specifically referred to as in (d) and (e)? The failure to mention them and to rely only on negligence could do nothing but mislead the trial court and the respondent if counsel had even intended to charge statutory violations thereunder.

Under countless decisions in the federal courts, in Illinois and in other states the rule is well established that a party will not be permitted to raise issues in a court of review for the first time which were not presented to the court below.

San Juan Light Co. v. *Requena*, 224 U. S. 89. On pages 96 and 97 of the opinion the court said:

> "It is urged that the negligence charged in the complaint related only to the condition of the wiring *inside* the residence of the deceased, and therefore that the court erred in permitting a recovery on the theory that the defendant was negligent in respect of the maintenance and care of the wires and converters *outside*. This contention must fail. While the complaint was not drafted with commendable precision, and, if critically examined, might be regarded as leaving it uncertain whether the negligence charged related to the wiring inside or to that outside whereby the current was supplied, there was no objection to this uncertainty in the court below. On the contrary,

the trial proceeded, as we have seen, upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party without objections from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of variance. Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review." (Italics ours.)

Illinois Central R. Co. v. *Egan*, 203 Fed. 937, (C. C. A. 8th). On page 939 of the opinion the court said:

"It is claimed in this court for the first time that the court below erred in holding that this cause is not one arising under the national Employer's Liability Act but under the state statutes of Iowa. Whether this was error it is unnecessary to determine in this action, as this objection was not made by the defendant in the court below, but, on the contrary, it insisted at every stage of the proceeding, from the time the motion to remand was filed until the close of the trial, that the cause was not one arising under the act of Congress but under the Iowa statutes. Therefore, even if it was error, which we do not decide, the defendant having invited it, and induced the court to commit it, it cannot now be heard to complain. *New York Elevated R. R. Co.* v. *Fifth National Bank*, 135 U. S. 432, 441, 10 Sup. Ct. 743, 34 L. Ed. 231; *Walton* v. *Chicago, etc., Ry. Co.*, 56 Fed. 1006, 1008, 6 C. C. A. 223, 225; *Chase* v. *Driver*, 92 Fed. 780, 786, 34 C. C. A. 668, 674; *Mechanics' Insurance Co.* v. *C. A. Hoover Distilling Co.*, 182 Fed. 590, 593, 105 C. C. A. 128, 131, 31 L. R. A. (N. S.) 873.

Nor is it permissible for one who tries his case upon one theory to change his position in the appellate court and ask for a reversal upon another and inconsistent theory. *New York, etc. Ry. Co.* v. *Estill*, 147

U. S. 591, 614, 13 Sup. Ct. 444, 37 L. Ed. 292; *Lesser Cotton Co.* v. *St. L., I. M. & S. Ry. Co.*, 114 Fed. 133, 142, 52 C. C. A. 95, 104; *Chicago, etc., Ry. Co.* v. *Voelker*, 126 Fed. 522, 529, 65 C. C. A. 226, 233, 70 L. R. A. 264; *Missouri, etc., Ry. Co.* v. *Wilhoit*, 160 Fed. 440, 443, 87 C. C. A. 403, 404."

M. K. & T. Ry. Co. v. *Wilhoit*, 160 Fed. 440, (C. C. A. 8th). The action instituted was to recover damages for personal injuries received by the plaintiff as a section man in defendant's employ. The trial resulted in a judgment for the plaintiff, and while the judgment was reversed on other grounds, the court said on page 443 of the opinion:

"We come next to several assignments predicated upon instructions refused, and others given, bearing upon the question, whether the plaintiff has assumed the risk of injury incident to his continued use of the defective car. The Court of Appeals was of opinion that this defense was not available to the defendant because it was not affirmatively pleaded in the answer. But the question of pleading thus suggested was not raised upon the trial. On the contrary, as the record discloses, each of the parties, without objection from the other, introduced testimony addressed to the question of the plaintiff's assumption of the risk, both presented requests for instructions bearing thereon, and the court charged the jury upon that subject. *We must, therefore, give effect to the settled rule, that when the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court of review.*" (Italics ours.)

Snyder v. *Snyder*, 142 Ill. 60. In that case proceedings were instituted to have a conservator appointed for an insane person. In the trial court the case was tried upon the theory that the question was whether the defendant had sufficient mental capacity to transact ordinary busi-

ness, whereas, under the statute, the question was whether the person was possessed of "sufficient mental capacity to care for and manage his estate." The court was asked to reverse the case because of this error. On page 67 of the opinion the court said:

> "Several other instructions given for the defendant announced the same principle in a different form. In view of the instructions given for the defendant at her request, if the theory upon which the court proceeded was not the correct one, it having been adopted at the request of the defendant, she can not now complain of the action of the court: *Calumet Iron and Steel Co.* v. *Martin*, 115 Ill. 358; *Illinois Central Railroad Co.* v. *Latimer*, 128 id. 163."

See also:

Lesser Cotton Co. v. *St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, (C. C. A. 8th); *Davis* v. *Ill. Collieries*, 232 Ill. 284; *Gascoigne* v. *Met. El. Ry.*, 239 Ill. 18.

B. There Was No Violation of the Boiler Inspection Act and Rule 153 Thereunder.

The jury found that mechanically there was nothing wrong with the tender or water tank. The presence of ice upon the deck of the tender had nothing to do with its mechanical operation. This did not constitute a defect within the meaning of the Safety Appliance Act. In the case of *Ford* v. *N. Y., N. H. & H. R. Co.*, 54 F. (2d) 342 (C. C. A. 2d), in which certiorari was denied, 285 U. S. 549, the evidence showed that there was grease on the handhold of one of the grab irons on the locomotive. In all other respects the locomotive was in good working condition. The court held that this did not constitute a violation of the two acts mentioned and in so doing said on page 344 of the opinion:

> "An examination of the debates in Congress on the passage of these acts, shows no intention by Congress

to impose civil liability for a condition occurring during the operation of the train which does not affect the construction and maintenance as required by the Safety Appliance Act. 61st Congress, 2d Session, Senate Documents, 446; 52d Congress, vol. 23, Congressional Record, pp. 592-5; volume 24, pp. 1273-1287; Senate Committee Report, vol. 24. Congressional Record, pp. 1246-1251."

Reeves v. *Chicago, St. P., M. & O. Ry. Co.*, 179 N. W. 689 (147 Minn. 114). In this case an employee met injuries because of a piece of coal upon a step leading to the locomotive cab. The court held this did not constitute violation of either act, and said on page 690 of the opinion:

"Plaintiff also contended that the federal 'Boiler Inspection Act,' so-called (U. S. Comp. St. §§ 8630-8639), as amended in 1915 (U. S. Comp. St. §§ 8639a-8639d), so as to 'apply to and include the entire locomotive and tender and all parts and appurtenances thereof,' and which makes it unlawful to use any locomotive engine propelled by steam power in moving interstate traffic unless the boiler and appurtenances thereof are in proper condition and safe to operate, and providing for inspection from time to time, creates a liability on the facts of this case. We think this act must be construed, as was the Safety Appliance Act, so as not to include cases where some foreign substance has found a temporary lodgment upon the appliances of the locomotive or tender, and which is not the result of the ordinary use of such instrumentalities but came there accidentally from some unforeseen cause."

Slater v. *Chicago, St. P., M. & O. Ry. Co.*, 178 N. W. 813 (146 Minn. 390). In this case the plaintiff met his injuries because a trespasser without the knowledge of the railroad displaced an ice bunker so that it projected upon the running board. On page 814 of the opinion the court said:

"Does the fact that a trespasser surreptitiously has placed a temporary obstruction like a loose board or cover upon a running board of a railroad car show a

violation of the act referred to? We think not. The running board itself was secure and mechanically perfect. There is no hint of any defect therein either as to material, workmanship, or design. The statute ought not to be construed as guaranteeing against the acts of trespassers, at least not unless such acts render the running board itself mechanically insecure. Sleet makes a running board insecure or unsafe for use; yet, we apprehend, it will not be contended that the Safety Appliance Statute is violated if a brakeman slips upon a running board coated with ice during a sleet storm."

The Supreme Court of Illinois in *C., R. I. & P. Ry. Co.* v. *Benson*, 352 Ill. 195 (185 N. E. 244) held the Safety Appliance Act was not violated where wire was wrapped around the grab irons. The court said on page 200 of the opinion:

"The grab-irons or hand-holds on the car in question complied with this section of the act. The wire which had been placed thereon by some person was no part of the grab-iron. (*Reeves* v. *C., S. P., M. & O. Ry. Co.*, 179 N. W. 689; *Slater* v. *C., St. P., M. & O. Ry. Co.*, 178 id. 813; *Craver* v. *Franklin Cotton Mills*, 145 S. E. 570.)"

Harlan v. *Wabash Ry. Co.*, 73 S. W. (2d) 749 (Supreme Ct. of Mo. 1934). It was claimed in this case that the failure of fellow employees to close a trap door in the floor of the cab over the stoker constituted a violation of the Boiler Inspection Act and the Safety Appliance Act. The court said, on pages 752 and 753 of the opinion:

"Defendant contends, and we think correctly so, that the facts proven do not show or constitute a violation of the Boiler Inspections Act, under our ruling in *Riley* v. *Wabash Ry. Co.*, 328 Mo. 910, 44 S. W. (2d) 136, 139. The evidence here does not show any mechanical defect from use or originally in the engine or any appliance thereof. It was not a mechanical defect or any faulty construction to have a trapdoor in the floor of the engine cab for the purpose of af-

fording access to the coal conveyor operating underneath the floor. Such was proper and necessary in case this mechanical stoker became clogged or needed adjustment or repair. The trapdoor was without defect and operated safely in the way and for the purpose intended. It was intended to be closed when not in use and the engine became 'unsafe to operate in the service to which the same was put' only because of the negligent act of leaving the trapdoor open when it ought to have been closed. The Boiler Inspection Act (45 U. S. C. A. § 22 *et seq.*) was not intended to cover the negligent act of an employee in the use or misuse of an appliance safe and proper in itself and free from mechanical defects."

In *Riley* v. *Wabash Ry. Co.*, 44 S. W. (2d) 136 it was contended that placing a clinker hook on the tender tank in such a way as to make it an element of danger constituted a violation of the Safety Appliance and Boiler Inspection Acts. The court said on page 141 of the opinion:

"The gist of plaintiff's instruction, authorizing a verdict against defendant, is that if the jury found that the servants or agents of defendant company, placed a clinker hook on top of the tender tank in a loose, insecure, and unsafe position, so as to render the tender unsafe to operate, resulting in plaintiff's injury, then defendant was liable, not having complied with the Boiler Inspection Act. The instruction does not require the jury to find that there was any defect, or that the tender was not properly equipped. All the jury was required to find was that defendant's servants or agents had misplaced the clinker hook, thereby creating the unsafe condition.

"This is not sufficient for a recovery under the Safety Appliance Act or Boiler Inspection Act."

We respectfully submit that to now hold that the judgment of the trial court could be sustained on the ground that there was a violation of the rules of the Interstate Commerce Commission when those rules were not alluded

to in the pleadings, or the evidence or the arguments of counsel or the instructions would be to deprive the respondent of its right to a trial by jury.

Counsel extol the virtues of a jury trial at great length in their brief (p. 53) and yet the essence of their argument about the interstate commerce rules is to ask that the judgment be affirmed on issues the jury never heard. In other words, they seek to deprive the respondent of a jury trial on the new issues here raised under Rule 153.

In their brief in this court (p. 17) counsel say that ice was something unclean within the meaning of the rule. But in the Appellate Court of Illinois that was not their position. In their petition for rehearing (R. 146) they said: "there was ice on the top of the tender which was dangerous and caused the plaintiff to be injured. *This was a direct result of the failure of the defendant to keep the top of the tender clean.*" In other words, something other than ice was involved. We respectfully submit that if we are to be held for something other than negligence, respect for enlightened jurisprudence requires that the issue be tried. To do otherwise makes a sham of the proceedings in the trial court.

VI.

Because of the Petitioner's Perfidy the Judgment of the Appellate Court of Illinois Was Correct.

Petitioner in elaborate detail and on repeated occasions testified that the tender was cracked and split and that water leaked out of it and that the stream was about the size of a pencil at the manhole where water is taken into the tender. Counsel for respondent fairly and dramatically warned the jury that if they found against the petitioner on that issue they would throw him out of court. The fairness of the trial is admitted by all. The jury, after being

fairly warned, and in answer to a specific interrogatory, found that that story of the petitioner was false. Under the Civil Practice Act of the State of Illinois (Sec. 189, chap. 110 Ill. Rev. Stat. 1941) if there is any inconsistency between the general verdict and a special verdict the latter controls.

Petitioner's testimony was material to the issues being tried. In fact the record readily discloses that that was virtually the only issue tried. The jury, therefore, found in effect that the petitioner committed perjury in the trial of this case.

In a court of equity the unclean hands of the petitioner in this respect would be sufficient to bar a recovery. Pomeroy Equity Jur., 5th Ed., Vol. II, Sec. 404. This court in the case of *Soo Line* v. *Rock*, 279 U. S. 410, denied recovery to a badly injured employee where he had fraudulently got another party to take a physical examination for the railroad which Rock would have been unable to pass. It is true the opinion in the Rock case was based on the want of a binding contract because of the fraud of the employee. We submit, however, that petitioner's false testimony is a far more serious matter than the fraud in the Rock case. Petitioner's conduct tends to bring the courts into disrepute. For this high court to say to him now that despite his perjured testimony conclusively established on the trial, admitted by him to be fair, that doubtful legal questions and factual issues will be resolved in his favor would be to invite misrepresentation, deceit and false testimony in the courts throughout the land.

We submit that for this reason alone the finding of the courts of review of the State of Illinois that the petitioner is not entitled to recovery should not be disturbed.

Conclusion.

For the foregoing reasons the respondent submits that the judgment of the Appellate Court of Illinois should be affirmed.

Respectfully submitted,

H. Victor Spike,
Silas H. Strawn,
Harold A. Smith.

SUPREME COURT OF THE UNITED STATES.

No. 124.—October Term, 1942.

Norvel H. Lilly, Petitioner, vs. Grand Trunk Western Railroad Company. } On Writ of Certiorari to the Appellate Court, First District, State of Illinois.

[January 11, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner brought this action in Illinois state court under the Federal Employers' Liability Act[1] and the Boiler Inspection Act[2] for personal injuries sustained on February 6, 1937, in the course of his employment as a brakeman in interstate commerce. A general verdict of $32,500 was returned in his favor by the jury, but on appeal the Appellate Court of Illinois for the First District entered judgment for respondent notwithstanding the verdict.[3] The Supreme Court of Illinois refused leave to appeal. We granted certiorari because of the important questions presented in the interpretation of the above-mentioned federal statutes.

Petitioner fell from the top of the locomotive tender while he was pulling a water spout, which was at the side of the track, over the tender's manhole by means of a rod and hook, preparatory to filling the tender's tank with water. As to the circumstances of the accident petitioner testified that the top of the tender between the water manhole and the fuel space, an area of some six square feet, was covered with ice; that there was a small leak at the collar of the manhole from which water flowed onto the tender's surface; that the rod, used for pulling the water spout over the tender, was frozen in the ice, and he had to kick it free; that he stood on the ice and braced himself as he reached out with the rod to pull the spout; and that as he pulled, the rod's hook slipped on the spout, and his feet simultaneously slipped on the ice, causing him to fall to the ground.

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[1] 45 U. S. C. §§ 51 *et seq.*
[2] 45 U. S. C. §§ 22 *et seq.*
[3] 312 Ill. App. 73, 37 N. E. 2d 888.

Petitioner's complaint charged negligence generally with respect to the presence of ice on the tender and also alleged as separate violations of the "Federal Safety Appliance Act" (more properly the Boiler Inspection Act), first that respondent used "a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that . . . the top where the plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life or limb, and the tender leaked there, . . .", and secondly that respondent used "a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the . . . tender . . . at the part where the water is supplied . . . to be (sic) cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, . . . rendering it likely and liable for the water to freeze and cause a dangerous condition, . . ."[4]

When the jury rendered its general verdict for petitioner, it also answered in the negative the following special interrogatory submitted by respondent:

"Was there, at the time of the accident in question, a leak in or near the manhole collar on the tender in question?"

Respondent then moved for judgment notwithstanding the verdict on the ground that the answer to the special interrogatory removed all question of violation of the Boiler Inspection Act from the case, that there was no evidence of negligence, and that in any event petitioner assumed the risk. The trial court denied this motion, but on appeal it was held well taken in all respects.

For our purposes the case resolves into two questions: (1) Granting, as the jury found, that the tender did not leak, could the jury nevertheless find that the Boiler Inspection Act was violated by the presence of ice on the tender's top; and, (2) Was the jury properly instructed that it might so find? We believe that both questions should be affirmatively answered and that the judgment below should be reversed.

The Boiler Inspection Act (§ 2) provides:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler,

[4] At the close of his case petitioner voluntarily dismissed two additional counts charging general negligence in supplying a defective rod and hook and general negligence in supplying a defective water spout.

tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U. S. C. § 23.

Negligence is not the basis for liability under the Act. Instead it "imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate without unnecessary peril to life or limb." *Southern Ry. Co.* v. *Lunsford*, 297 U. S. 398; 401; *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521; cf. *Brady* v. *Terminal R. R. Assn.*, 303 U. S. 10. Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act. *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, 210-211; *Great Northern Ry. Co.* v. *Donaldson*, 246 U. S. 121; *Baltimore & O. R. R. Co.* v. *Groeger*, *supra*. The Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. Cf. *Great Northern Ry. Co.* v. *Donaldson*, *supra*; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 295-96; *Louisville & Nashville R. R. Co.* v. *Layton*, 243 U. S. 617, 621; *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.*, 294 U. S. 529, 531. And, the Interstate Commerce Commission is broadly authorized to set the standards of compliance by prescribing "rules and regulations by which fitness for service (of locomotives, tenders and their appurtenances) shall be determined", *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612, provided that, it has been said, the Commission finds such are required to remove unnecessary peril to life or limb. *United States* v. *B. & O. R. Co.*, 293 U. S. 454; cf. *Southern Ry. Co.* v. *Lunsford*, *supra*. With these considerations in mind, we turn to the first question.

The use of a tender, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve "unnecessary peril to life or limb"—enough so as to permit a jury to find that the Boiler Inspection Act has been violated. Fortunately, we are not left wholly to our own resources in construing the Act in the light of its humanitarian purpose. The

Interstate Commerce Commission has set the standard here by promulgating a rule (No. 153) that the "Top of tender behind fuel space shall be kept clean and means provided to carry off waste water."[5] From the phrasing of Rule 153 we think it aimed at requiring the top of the tender to be kept free of foreign matter which would render footing insecure, for example, coal, dust, debris, grease, waste water, and ice. While the locomotive inspection rules are generally devoted to details of construction and specification of materials, at least one other rule deals with the condition of surfaces upon which employees must stand.[6] In using the word "clean" the Commission must have meant something more than mere manner of construction or mechanical operation because "clean" does not naturally lend itself to such a limited connotation. That something more is the continuing duty of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous.

From various cases denying recovery under the Act respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter.[7] But there is no warrant in the language of the Act for construing it so

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[5] The full text of Rule 153 follows:

153. Feed water tanks.—(a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

(b) Not less frequently than once each month the interior of the tank shall be inspected, and cleaned if necessary.

(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. Suitable covers shall be provided for filling holes.

See Official Pamphlet of Interstate Commerce Commission, Bureau of Locomotive Inspection, Orders dated October 11, 1915, to February 21, 1929; Roberts, Federal Liabilities of Carriers (2d ed.) vol. 2, p. 2069.

[6] Rule 117 provides:

117. Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing.

See Official Pamphlet, *supra*, and Roberts, *op. cit.*, p. 2062.

[7] Ford v. N. Y., N. H. & H. R. Co., 54 F. 2d 342 (grease on a locomotive grab iron held no violation of Safety Appliance and Boiler Inspection Acts); Reeves v. Chicago, St. P., M. & O. Ry. Co., 147 Minn. 114, 179 N. W. 689 (presence of coal upon a step leading to the locomotive cab held no violation of Safety Appliance and Boiler Inspection Acts); Slater v. Chicago, St. P., M. & O. Ry. Co., 146 Minn. 390, 178 N. W. 813 (holding no cause of action under Safety Appliance Act for injuries caused by an ice bunker displaced by a trespasser so it projected upon the running board); C. R. I. & P. Ry. Co. v.

narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment "in proper condition and safe to operate . . . without unnecessary peril to life or limb". Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb. Whatever else may be said about the cases relied upon by respondent, they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation.

Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. No claim is advanced that the rule is invalid, and we see no reason for questioning it. Adopted in the exercise of the Commission's authority, Rule 153 acquires the force of law and becomes an integral part of the Act (cf. *Napier* v. *Atlantic Coast Line, supra; United States* v. *B. & O. R. Co., supra*), to be judicially noticed. *Caha* v. *United States*, 152 U. S. 211, 221-22. The failure of petitioner's counsel to call Rule 153 to the attention of the trial court should no more deprive petitioner of its benefits than the failure to plead specifically the Federal Employers' Liability Act foreclosed the application of that Act on appeal to test the correctness of the trial judge's refusal to charge in *Grand Trunk Ry. Co.* v. *Lindsay*, 233 U. S. 42, especially when, as here, the rule only fortifies a result which we think the jury could probably have reached even in the absence of such a rule.

Concluding that the jury had a right to find a violation of the Boiler Inspection Act by reason of the presence of ice on the top of the tender even though there was no leak, we turn now to the second question: Was the jury properly instructed that it might so find? The court below held and respondent here earnestly insists that with regard to the Boiler Inspection Act the case was tried solely on the theory that the only violation of that Act charged was that the tender leaked, and the answer to the special

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Benson, 352 Ill. 195, 185 N. E. 244 (Safety Appliance Act held not violated by wrapping wire around grab-irons); Harlan v. Wabash Ry. Co., 335 Mo. 414, 73 S. W. 2d 749 (failure of fellow employees to close a trap door in the cab over the stoker held no violation of the Boiler Inspection and Safety Appliance Acts); Riley v. Wabash Ry. Co., 328 Mo. 910, 33 S. W. 2d 136 (holding no cause of action existed under Boiler Inspection Act for injuries sustained because a clinker hook was misplaced on a tender top by a fellow servant).

interrogatory therefore removed all question of violation of the Act from the case. This was not the view of the trial judge, and while the record is not as satisfactory as we might wish, we agree with him.

It is true that both charges of violation of the Act do allege the presence of a leak, and petitioner's counsel did say in his closing argument to the jury: "So, as I say, gentlemen, don't find there was no leak, or you put him (petitioner) out of court." But there is no reason to penalize petitioner for remarks of counsel uttered in an excess of zeal, and the full text of the complaint is such that it is fair to say that the presence of a leak was vital to only one charge of violation of the Act, being merely an incidental, non-essential allegation of the other.[8] This was the understanding of the trial judge, upon whom rests primarily the function of interpreting the pleadings. For in overruling respondent's motion for judgment notwithstanding the verdict the trial judge said: "Now, whether there was a crack or not, yet still the question of the Safety Appliance (Boiler Inspection Act) could remain in there

[8] Thus while a leak is alleged in paragraph 4(d) of the complaint, the full text makes it clear that the gist of the charge is simply the presence of ice:

"d. Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that the defendant required, caused and permitted plaintiff to work on the tender of the locomotive of his train on the occasion above charged, in the act of putting water in the tender of the locomotive, this tender was unsafe because the top where the plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life or limb, and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition on top of the tender and was thrown and caused to fall and be seriously injured."

On the other hand the essence of Paragraph 4(e) is the presence of a leak as the following full quotation shows:

"e. Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard, Michigan, a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the defendant did operate this locomotive and tender with the tender of this locomotive at the part where the water is supplied to and poured into the locomotive to be cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, hole and aperture and to flood, seep and cover the top of the tender where plaintiff was required to be in the performance of his duties as employee, rendering it likely and liable for the water to freeze and cause a dangerous condition, and thereby, by reason of this violation on the part of the defendant of this Federal Safety Appliance Act, the water in this tender did leak through this defective place onto the top of the tender, and did freeze, and it thereby caused plaintiff, while he was so at work, as above charged, on the top of this tender, to slip and be thrown and seriously injured."

if the Court did feel that it was the duty of the defendant to keep the tender clear so that the man might operate."

In his instructions to the jury the judge read the Boiler Inspection Act and stated:

"'You are instructed that under the law the defendant was bound to furnish to the plaintiff a locomotive, at the time in question, which was safe to be used, and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk.'"

Respondent took no exception. We think this charge sufficiently informed the jury that it could find a violation of the Act from the presence of ice, even if there were no leak. Evidently this was the understanding of the jury because it found nothing incongruous in simultaneously answering the special interrogatory negatively and returning a general verdict for petitioner despite counsel's statement that a finding of no leak would put his client out of court.

Since petitioner's injuries were the result of respondent's violation of the Boiler Inspection Act, the partial defense of contributory negligence and the bar of assumption of risk are not available to respondent under §§ 3 and 4 of the Federal Employers' Liability Act, 45 U. S. C. §§ 53, 54, as those sections existed at the date of the accident. This disposition of the case makes it unnecessary to consider either whether respondent was generally negligent, or the merits of petitioner's contention, based on the premise that respondent was so negligent, that the 1939 amendment to § 4 of the Federal Employers' Liability Act, 53 Stat. 1404, completely abolishing the defense of assumption of risk in actions under that Act, should be given retroactive application.

Under the facts of this case and the applicable law the jury could rightfully find for petitioner. The benefits of that rightful determination should not have been taken from him.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice FRANKFURTER concurs in the result.